91-715

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HERZFELD & RUBIN, P.C.,
Petitioner,

v.

HARRY ROBINSON, KAY ROBINSON, EVA MAY MCCARTHY, GEORGE SAMUEL ROBINSON, and GREER & GREER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Are private attorneys, in contrast to government lawyers, subject to civil damage actions in which defeated adversaries may relitigate finally adjudicated matters, based on allegations that the attorneys' actions and statements in court as advocates for their clients constituted misconduct causing the loss of prior federal lawsuits; or, does absolute common law immunity from civil damage liability apply to "all persons—governmental or otherwise—who were integral parts of the judicial process." *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983).

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* The caption lists all parties with the exception of Volkswagen Aktiengesellschaft, a corporation organized under the laws of the Federal Republic of Germany with its place of business in that nation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Herzfeld & Rubin, P.C. respectfully petitions for a writ of certiorari to review the Order of the Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit (1a-12a, *infra*) is reported at 940 F.2d 1369. The decision of the United States District Court for the Northern District of Oklahoma (13a-16a) is unreported.

JURISDICTION

The Order of the United States Court of Appeals for the Tenth Circuit was entered on August 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT

The plaintiffs in this action, in nearly a decade of litigation, lost on the merits at trial and on two appeals in the federal courts. In the present action, they nevertheless seek to relitigate their claims in the guise of a "fraud" action against the attorneys for the prevailing parties. Plaintiffs' substantive claims are based on the attorneys' acts and statements as advocates in the prior judicial proceedings. This petition challenges the lower courts' refusal to apply absolute immunity as a bar to such claims and dismiss the action in favor of the other corrective recourse available in the judicial system for such alleged misconduct.

In deciding immunity questions, this Court has looked to the common law doctrine of absolute immunity. Such immunity encompassed "all persons—*governmental or otherwise*—who were integral parts of the judicial process." *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) (emphasis added). As this case demonstrates, without such protection, it is "inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict." *Mitchell v. Forsyth*, 472 U.S. 511, 521-22 (1985). The resulting burden on the judicial process would cast a pall over all participants in litigation.

Based on this Court's leading decisions, other courts of appeal have recognized that the protections of immunity are essential to ensure the proper performance of their duties by both private and government advocates in civil litigation. (Point I, *infra*) In the decision below, however, the Tenth Circuit denied immunity to privately retained defense attorneys sued for alleged "fraud" based on the attorneys' successful arguments concerning the introduction of certain evidence. The circuit court acknowledged that absolute immunity has been extended to attorneys defending civil litigation brought against state and federal governments with respect to conduct indistinguishable from that in suit. However, the court purported to discern a distinction at common law between government and private attorneys, under which private attorneys' immunity barred only claims sounding in defamation. The rule adopted below would thus permit an attorney's ostensible immunity from intimidation and harassment by unsuccessful adversaries to be sidestepped merely by artful pleading in subsequent litigation.

The decision below conflicts, not only with other circuits, but with virtually every rationale espoused by this Court in support of immunity. (Point II, *infra*) Most basically, "freeing the judicial process from harassment or intimidation has been thought to require absolute immunity even for *advocates* and witnesses." *Forrester v. White*, 484 U.S. 219, 226 (1988) (emphasis added). The key principle of finality of judgments is likewise implicated, as "controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum

will frequently seek another." *Butz v. Economou*, 438 U.S. 478, 512 (1978).

Because the object of protection is the process rather than its participants, "immunity analysis rests on functional categories, not on the status of the defendant." *Briscoe v. LaHue*, 460 U.S. at 342 (Point III, *infra*). Despite lip service to the functional analysis mandated by this Court, however, the court below denied immunity based solely on the non-governmental "status of the defendant" attorneys. *Id.*

This result carries a particular potential for mischief because its rationale, though at odds with this Court's relevant doctrines, purports to be based on the very line of cases with which it in fact conflicts. Such a fundamental misreading of this Court's teachings should be addressed as soon as it appears. Review by this Court is needed to clarify the application of the governing doctrines to privately retained counsel and to resolve the inter-circuit conflicts in this area.

Background

This litigation arises from a highway collision and fire in 1977, in which plaintiffs' Audi sedan was struck from the rear by a pickup truck travelling over ninety miles an hour. Claiming that defective design of their vehicle's fuel tank had caused its rupture on impact, plaintiffs commenced suit for personal injuries in the Oklahoma state courts. The named defendants were the vehicle's importer Volkswagen of America, Inc. ("VWOA"), its designer and manufacturer Audi NSU Auto Union Aktiengesellschaft, now Audi AG ("Audi"), its wholesale distributor and the retail

dealer. *See Robinson v. Audi NSU Auto Union*, 739 F.2d 1481, 1482-1483 (10th Cir. 1984).[1]

Immediately after the dealer and wholesale distributor were dismissed by this Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the remaining defendants, VWoA and Audi, removed the action to the United States District Court for the Northern District of Oklahoma based upon diversity of citizenship.

At trial in late 1981, the jury found for the defendants. Over the next five years, this outcome was reviewed and affirmed twice, and rehearing was sought and denied on each appeal. *Robinson v. Volkswagen of America, Inc.*, 803 F.2d 572 (10th Cir. 1986); *Robinson v. Audi NSU Auto Union*, 739 F.2d 1481.

At all relevant times, petitioner Herzfeld & Rubin, P.C. ("H&R") was defendants' supervising trial counsel. As such, H&R actively participated in all phases of the case, including discovery and trial.

The Present Litigation

On October 5, 1987, approximately one year after the Tenth Circuit denied rehearing of their second appeal on the merits, plaintiffs commenced the present diversity action. Naming new defendants, plaintiffs sought the precise damages which they had failed to obtain against the original defendants. With respect to H&R, plaintiffs asserted a cause of action

[1] VWoA's German parent Volkswagenwerk Aktiengesellschaft ("VWAG"), though originally named as a defendant, was voluntarily dismissed by plaintiffs early in the litigation in favor of Audi, the actual designer and manufacturer of the subject vehicle.

in common law fraud, based upon answers to interrogatories and statements at trial arguing the admissibility of evidence. According to plaintiffs, these discovery and trial statements by H&R fraudulently concealed the "true relationship" between VWAG and Audi from plaintiffs, thereby precluding them from using certain liability evidence during the trial. (3a)[2]

The case was filed in the District of Arizona, which transferred the case to the Northern District of Oklahoma as an attack on the judgment on the merits. Following transfer, H&R moved to dismiss the complaint, or in the alternative for summary judgment. In support of those motions, H&R claimed, *inter alia*, that it was absolutely immune from civil damage liability to an adversary based upon its discovery and courtroom conduct in the previous trial.[3]

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[2] In addition to the claims against H&R at issue on this petition, plaintiffs sought to retry their lost personal injury action, asserting claims for negligence, strict products liability and breach of warranty, notwithstanding the twice-affirmed adverse verdict on the merits. Plaintiffs also sued VWAG for fraud in connection with answers to interrogatories and representations at trial and asserted a malpractice claim against their former trial counsel, Greer & Greer, who cross-claimed against H&R and VWAG. (3a) These claims are not before this Court, except to the extent that H&R's claim of immunity also applies to the cross-claim of plaintiff's former trial counsel.

[3] Since the transfer to the Northern District of Oklahoma, plaintiffs have filed two additional actions. In the Northern District of Oklahoma, plaintiffs have brought a plenary action against the original defendants Audi and VWoA seeking to set aside the previous judgments for fraud on the court under Rule 60(b), F.R.Civ.P. They have also commenced an additional fraud and product liability action against VWoA and Audi now pending in the District of Arizona. No aspect of these actions is at issue on the present petition.

Rulings Below

The district court denied H&R's claim of absolute immunity, holding without discussion that "any immunity that might attach to a private attorney's conduct does not attach to the conduct alleged in this case to be fraudulent" (3a).[4] H&R appealed, and the court of appeals affirmed in the decision challenged on the present petition.

The court below summarized its rationale as follows:

> In resolving absolute immunity claims, the Supreme Court has taken a functional approach after considering the history of common law immunity. *See, e.g., Briscoe v. LaHue*, 460 U.S. 325, 334-35, 345 (1983) (absolute immunity for witnesses). Relevant factors include the recognition of immunity at common law, the risk of vexatious litigation given the function involved, and the availability of checks other than civil litigation if absolute immunity was recognized. [footnote] *Burns*[*v. Reed*], 111 S. Ct. [1934,] 1941-44 [(1991)]; *Mitchell v. Forsyth*, 472 U.S. 511, 521-22 (1985). In this case, however, the absolute immunity precedent indicates that H&R's claim of absolute immunity would not be recognized at common law; we need proceed no further. (4a)
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> * * *
>
> . . . only in a narrow class of cases involving def-

[4] The district court dismissed plaintiffs' products liability claims, ruling that those claims could not be relitigated given the prior adverse judgment. The court, however, held that the complaint stated a state common law fraud claim, thus bringing H&R's assertion of immunity from such a claim to the fore.

> amation claims has the Supreme Court acknowledged a common law tradition of absolute immunity for private lawyers.(5a)
>
> * * *
>
> While we recognize that prosecutors and government lawyers defending civil actions have been granted absolute immunity on similar claims, [extensive footnote] the cases do not support an analogous common law tradition for private lawyers. (8a-9a)

Accordingly, the court denied H&R the immunity which it conceded would be enjoyed by government attorneys in federal court with respect to the claims in suit.[5]

REASONS FOR GRANTING THE WRIT

I. The Decision Below Directly Conflicts With A Leading Decision Of The First Circuit, And Is Seriously At Variance With The Approach To Immunity Taken By Other Circuits.

The analytical linchpin of the decision below is the circuit court's finding that "the absolute immunity precedent indicates that H&R's claim of absolute immunity would not be recognized at common law." (4a)

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[5] There has been no dispute that the governing immunity doctrines are matters of federal law. *See Ferri v. Ackerman*, 444 U.S. 193, 197-98 n.10 (1979), quoting *Ferri v. Ackerman*, 394 A.2d 553-55 (Pa. 1978) ("Since we are here concerned with an asserted immunity protecting a participant in a federal legal proceeding, we are required to look to the federal law to determine whether it exists and if it does, its nature and scope."). *See generally Westfall v. Erwin*, 484 U.S. 292 (1988); *Howard v. Lyons*, 360 U.S. 593 (1959).

On this key point, the court below is directly in conflict with the First Circuit and substantially at odds with other circuits which have addressed the immunity issue in civil litigation.

The First Circuit has delineated unequivocal common law support for the comprehensive immunity covering private attorneys which the Tenth Circuit found not to exist. In *Blanchette v. Cataldo*, 734 F.2d 869 (1st Cir. 1984), the First Circuit upheld absolute immunity from all civil damages liability to an adversary for any statements made in connection with the conduct of litigation, regardless of the cause of action asserted. The First Circuit drew no distinction between government or private attorneys in regard to the scope of the immunity, and specifically rejected the notion that private attorneys were immune only to defamation actions:

> Under Massachusetts law, an attorney's statements are absolutely privileged "where such statements are made by an attorney engaged in his function as an attorney whether in the institution or conduct of litigation or in conferences and other communications preliminary to litigation." *Sriberg v. Raymond*, 370 Mass. 105, 109, 345 N.E.2d 882, 884 (1976). . . . Thus, the Massachusetts courts have applied the privilege, not only in defamation cases, but as a general bar to civil liability based on the attorney's statements. *Sullivan v. Birmingham*, [11 Mass. App. 359,] 416 N.E.2d [528,] 533 [(1976)].

734 F.2d at 877. The conflict with the finding in the decision below that "H&R's claim of immunity would not be recognized at common law" (4a) could hardly be more clear.

Moreover, the First Circuit in *Blanchette* traced the relevant common law immunity authority directly to the leading early American case on the common law of judicial immunity for counsel, *Hoar v. Wood*, 44 Mass. (3 Metc.) 193 (1841) (Shaw, C.J.), a decision to which this Court has also turned for guidance. *See, e.g. Burns v. Reed, supra; Briscoe v. LaHue, supra.* The Tenth Circuit below read *Hoar v. Wood* narrowly as support only for a defamation immunity. (6a-7a n.4) In fact, the common law authority stemming directly from *Hoar v. Wood* has emphatically rejected that limitation:

> The public policy of permitting attorneys complete freedom of expression and candor in communications in their efforts to secure justice for their clients commends itself to us. The basic elements of such a policy were recognized early in this Commonwealth by Chief Justice Shaw in the following terms: "[I]t is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes, and advocating and sustaining the rights, of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions." *Hoar v. Wood*, 3 Metc. 193, 197-198 (1841).

Sriberg v. Raymond, 345 N.E.2d at 884, quoted in *Blanchette*, 734 F.2d at 877. Other states facing the issue have similarly refused to countenance "numerous and refined distinctions" limiting common law immunity for litigation conduct only to defamation

claims.[6] The conflict with the decision below is profound in nature and comprehensive in scope.

The decision below frankly acknowledged that other circuits have applied this Court's leading decisions in support of absolute immunity to attorneys defending civil litigation against the federal and state governments. (8a-9a n.5) The circuit court below sought to distinguish these cases based on the governmental status of the attorney defendants in those cases. The rationales espoused by other circuits, however, make it clear that the immunity accorded government lawyers is merely a part of the broader protection which must encompass all advocates in civil litigation.

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[6] *E.g. Block v. Sacramento Clinical Labs, Inc.*, 131 Cal.App.3d 386, 182 Cal.Rptr. 438, 440-41 (1982) and numerous cases cited (immunity bars all tort actions, "however labeled and whatever the theory of liability," seeking to recover for false statements in judicial or other protected proceedings); *Thornton v. Rhoden*, 245 Cal.App.2d 80, 99, 53 Cal Rptr. 706, 719 (1966) ("If it is desirable to create an absolute privilege in defamation . . . because we do not want the honest [attorney] to have to be concerned with libel or slander actions while acting for his client, we should not remove one concern and saddle him with another for doing precisely the same thing."); *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552, 554, 117 A.2d 889, 895 (1955) ("If the policy . . . is really to mean anything then we must not permit its circumvention by affording an almost equally unrestricted action under a different label.") *Accord, Sullivan v. Birmingham*, 416 N.E.2d at 533-34 (cited with approval in *Blanchette v. Cataldo, supra*) ("[The policy underlying immunity] would be severely undercut if the absolute privilege were to be regarded as less than a bar to all actions arising out of the 'conduct of parties and/or witnesses in connection with a judicial proceeding.'")

For example, the Seventh Circuit has stated the rationale for absolute immunity in terms which do not suggest an exception for private counsel:

> . . . the primary reason for granting attorneys absolute immunity is that their unique function as advocates requires that they be able to present their client's case at trial without intimidation or harassment.

Auriemma v. Montgomery, 860 F.2d 273, 278 (7th Cir. 1988), *cert. denied*, 492 U.S. 906 (1988). It cannot seriously be contended that private citizens are less entitled to counsel "able to present their client's case at trial without intimidation or harassment" than the government.

In a similar vein, the Second Circuit, in *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986), found that the absolute immunity afforded prosecutors for conduct during litigation was necessarily available to government attorneys *defending* civil suits. Making immunity depend on whether the lawyer acts in the capacity of counsel for "plaintiff" or "defendant" elevated form over substance. 798 F.2d at 572. The Second Circuit further observed that "[e]xtension of absolute immunity to defending government litigators finds common law and historical support in the broader principle that 'the immunity which is extended to the judges is in like manner extended to the attorneys in the presentation of a client's case to the court or the jury.'" *Id.* (citing *Yaselli v. Goff*, 12 F.2d 396, 402 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927)). There is no hint that the "broader principle" articulated in *Barrett* excludes any category of attorney based on the identity of the attorney's client.

Likewise, the Eighth Circuit in *Murphy v. Morris*, 849 F.2d 1101 (8th Cir. 1988), found in this Court's decisions "a firm common law and historical basis for the extension of immunity to trial counsel." 849 F.2d at 1105. Though considering the case of a government attorney defending a civil rights claim, the Eighth Circuit, like the Seventh and Second Circuits, articulated the broader immunity doctrine upon which the present petition rests, and concerning which the court below erred.

The conflicting authority in regard to the scope of immunity as applied to private attorneys acting as advocates within the federal court system fully warrants this Court's attention. The head-on conflict between the First and Tenth Circuits is certain to generate substantial litigation burdens in a number of future cases, with conduct that would be absolutely immune within one circuit exposing the actor to suit in another. The lack of a uniform standard can only be definitively addressed by this Court.

II. In Holding That There Is No Common Law Support For The Immunity Claimed, The Decision Below Fundamentally Misreads This Court's Relevant Line Of Authority.

The finding below that the common law would not recognize the immunity claimed on behalf of private defense counsel conflicts, not merely with other circuits, but with this Court's clear pronouncements. First, this Court itself has left no doubt that there is "a historical or common law basis for the immunity" being claimed:

> The common law's protection for judges and prosecutors formed part of a "cluster of immunities

> protecting the various participants in judge-supervised trials," which stemmed "from the characteristics of the judicial process." *Butz v Economou*, [*supra*], 438 U.S. [at] 512 . . .; cf. *King v Skinner*, Lofft 54, 56, 98 Eng. Rep. 529 (K.B. 1772) ("[N]either party, witness, counsel, jury, or judge can be put to answer, civilly or criminally, for words spoken in office"). The common law recognized that
>
> > "controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another. . . . Absolute immunity is thus necessary to assure that judges, *advocates*, and witnesses can perform their respective functions without harassment or intimidation." *Butz, supra,* at 512.
>
> In short, the common law provided absolute immunity from subsequent damages liability for all persons—*governmental or otherwise*—who were integral parts of the judicial process.

Briscoe v. LaHue, 460 U.S. at 335 (emphasis added).

Nevertheless, the court below professed itself unable to perceive a common law basis for the claimed immunity. In support of this conclusion, the circuit court relied upon *Tower v. Glover*, 467 U.S. 914 (1984) and *Burns v. Reed, supra*. This reliance was gravely misplaced.

Tower v. Glover is patently inapplicable, as it involved a controversy between counsel and client. *Id.*, 467 U.S. at 916. Attorneys, of course, have no immunity from malpractice claims by their own clients. For that very reason, prior to *Tower v. Glover*, this

Court had already noted the distinction between lawyer-client litigation, in the immunity context, and "other kinds of tort suits . . . brought by someone other than [an attorney's] client." *Ferri v. Ackerman*, 444 U.S. at 204 n.22.

The circuit court's reliance on *Burns v. Reed*, *supra*, is, frankly, puzzling. Far from abrogating the claimed immunity, *Burns v. Reed* virtually echoes *Briscoe v. LaHue*, *supra*, in expounding the common law's grant of absolute immunity to counsel with respect to any civil claims arising from allegedly false statements in judicial proceedings, whether defamatory or not:

> Like witnesses, *prosecutors and other lawyers were absolutely immune from damages liability at common law for false or defamatory statements in judicial proceedings* (at least so long as the statements were related to the proceeding), and also for eliciting false and defamatory testimony from witnesses.

111 S.Ct. at 1941 (emphasis added).

The court below misread *Burns* in two respects. First, it ignored this Court's direct statement that immunity applied to "false *or* defamatory" statements by counsel. Second, it read *Burns* as applying only to defamation cases merely because the cited cases all happened to involve defamation claims. These errors led to the circuit court's startling conclusion that this Court has restricted counsel's immunity to "a narrow class of cases involving defamation claims." (5a) In fact, it appears that this Court has never decided any immunity case involving private counsel's immunity to defamation claims.

This court's relevant immunity decisions, fairly read, provide no support whatever for the circuit court's finding that the immunity at issue was unknown to the common law.[7] To the contrary, they squarely establish the first leg of this Court's three part test for immunity, "a firm common law and historical basis for the extension of immunity to trial counsel." *Murphy v. Morris*, 849 F.2d at 1105. *Mitchell v. Forsyth*, 472 U.S. at 521.[8]

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[7] The circuit court further sought to analogize the claims in this case to a suit for malicious prosecution, from which private attorneys, unlike prosecutors, are not immune. (7a) This approach, which we have not found employed by any other court, is totally inapposite. To take the circuit court's own example, a private attorney abetting a client's instigation of proceedings by a third party is by definition not functioning as an advocate in a judicial proceeding and thus lacks any colorable claim to immunity. In similar circumstances, prosecutors have been denied immunity for legal advice to the police before judicial proceedings are instigated. *Burns v. Reed*, 111 S.Ct. at 1944-45. Even judges have no immunity for their non-judicial or administrative conduct. *Forrester v. White*, 484 U.S. at 230; *cf. Mireles v. Waco*, No. 91-311, 60 U.S.L.W. 3161 (October 21, 1991). More fundamentally, a malicious prosecution action, which can be brought only by *prevailing defendants*, is the antithesis of an attempt by *defeated plaintiffs* to relitigate losing claims. *See* Restatement (2d) Torts §§ 653 (criminal), 674(b) (civil).

[8] The three elements are set forth in *Mitchell v. Forsyth*, in the following terms:

> —whether there is "a historical or common law basis for the immunity" (*Id.* at 521);
>
> —whether performance of the function as to which immunity is claimed creates "obvious risks of vexatious litigation" (*ibid*); and
>
> —whether those claiming immunity "are subject to other checks that help to prevent abuses . . . from going unredressed" (*Id.* at 522)

As to the second element of immunity analysis, no imagination is needed to appreciate that performance of the function of trial counsel creates "obvious risks of vexatious litigation." *Id.* at 521. Indeed, this case itself exemplifies the point. When fought to a finish, high stakes lawsuits will invariably disappoint one side, often bitterly so. As this Court noted, it is

> inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict. . . . [T]he mere threat of litigation may significantly affect the fearless and independent performance by actors in the judicial process.

Id. at 521-522. *See also, e.g., Barrett v. United States*, 798 F.2d at 572.

The final relevant factor in extending immunity, whether there are "other checks that help to prevent abuses . . . from going unredressed," is also addressed definitively in *Mitchell v. Forsyth* itself:

> [T]he judicial process is largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results.

472 U.S. at 522-23.

Prominent among those safeguards is Rule 60(b), Fed. R. Civ. P., under which judgments tainted by fraud on the court may be vacated at any time in the interest of justice. Remedies against advocates include disciplinary proceedings, contempt, and the

provisions of Rule 11 and 28 U.S.C. § 1927. *See Mitchell v. Forsyth*, 472 U.S. at 522-23; *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *Murphy v. Morris*, 849 F.2d at 1105; *Barrett v. United States*, 798 F.2d at 573; *Blanchette v. Cataldo*, *supra*. These codified sanctions are reinforced by the inherent powers of the courts to deal with misfeasance by attorneys, including violations of established ethical norms. *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123, 2134 (1991); *In re Snyder*, 472 U.S. 634, 645 (1985). The immunity doctrine merely excludes from this arsenal damage suits by those who wish that the final outcome of previous litigation had been different.

Private attorneys in federal civil litigation satisfy all elements of the test laid down by this Court in *Mitchell v. Forsyth*, *supra*. The decision of the Tenth Circuit denying immunity solely on the basis of an advocate's private status is plainly incorrect.

III. The Holding Below That Government Attorneys Are In Effect More "Integral Participants In The Judicial Process" Than Private Attorneys Runs Precisely Counter to the Policies Behind the Immunity Doctrine.

The status-based distinction drawn by the Tenth Circuit between government and private advocates is not easily squared with this Court's relevant decisions:

> . . . immunity analysis rests on functional categories, not on the status of the defendant.

Briscoe v. LaHue, 460 U.S. 325 at 342; *see also Imbler v. Pachtman*, 424 U.S. 409. This conclusion is com-

pelled by the policy considerations behind immunity, which apply with equal force to privately retained attorneys:

> . . . [F]reeing the judicial process of harassment or intimidation—has been thought to require absolute immunity even for advocates and witnesses.

Forrester v. White, 484 U.S at 226 (citing *Briscoe, supra*; *Butz v. Economou*, 438 U.S. at 512). Private attorneys representing their clients, are no less "integral parts of the judicial process," *Briscoe v. LaHue, supra*, and no less entitled to freedom from harassment or intimidation than attorneys defending the government in civil litigation. Indeed, the threat of civil liability will often more effectively chill the zealous efforts a private attorney should make as an advocate on behalf of a client than would be the case with a government employee. *See United States v. Hurt*, 543 F.2d 162, 165-68 (D.C. Cir. 1976).

No extended discussion is needed. The decision below plainly runs counter to the overriding public policy considerations upon which absolute privilege rests. Left unreviewed, the erroneous doctrines espoused below will inhibit "[t]he first essential element of effective assistance of counsel", which is "counsel able and willing to advocate fearlessly and effectively," *id.* at 167-68—with no countervailing public benefit.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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October, 1991

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-5082

HARRY ROBINSON and KAY ROBINSON, EVA MAY McCARTHY
and GEORGE SAMUEL ROBINSON
Plaintiffs-Appellees,

vs.

VOLKSWAGENWERK AG,
Defendant,

GREER & GREER,
Defendant-Appellee,
and HERZFELD & RUBIN, P.C.,
Defendant-Appellant.

FILED August 1, 1991

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Herbert Rubin (and Daniel V. Gsovski, Herzfeld & Rubin, New York, New York, Richard M. Eldridge & John F. Tucker, Rhodes, Hieronymous, Jones, Tucker & Gable, Tulsa, Oklahoma, with him on the brief) for Defendant-Appellant. Thomas Elke, Palo Alto, California (Ronald D. Mercaldo & Lucille D. Sherman, Law Offices of Ronald D. Mercaldo, Ltd., Tucson, Arizona, Winton D. Woods, Tucson, Arizona, Maynard I. Ungerman, Ungerman & Iola,

Tulsa, Oklahoma, with him on the brief) for Plaintiffs-Appellees.

Jack Redhair (and Nancy Coomer, Chandler, Tullar, Udall & Redhair, Tucson, Arizona, with him on the brief) for Defendant-Appellee.

Before TACHA and BALDOCK, Circuit Judges, and KANE, District Judge.[1]

BALDOCK, Circuit Judge.

Defendant-appellant Herzfeld & Rubin,P.C. (H & R) appeals from an interlocutory order of the district court denying a motion to dismiss and a motion for summary judgment filed by itself and defendant Volkswagenwerk AG (VWAG). See V R. doc. 199 (Amended Order filed Apr. 25, 1990). Normally, our jurisdiction under 28 U.S.C. § 1291 extends only to final orders. Appellant H & R correctly maintains that we have jurisdiction based on the collateral order doctrine as applied to a denial of absolute immunity. *See Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982); *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979); *Abney v. United States*, 431 U.S. 651, 657-63 (1977); *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546-547 (1949). Appellant also urges us to exercise pendent appellate jurisdiction over several interlocutory rulings of the district court pertaining to the merits of the controversy. *See Snell v. Tunnell*, 920 F.2d 673, 676 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1622 (1991).

This case has a protracted history which we need not detail other than to say that the plaintiffs have been unsuccessful in obtaining relief for injuries suffered in a tragic automobile accident. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Robinson v. Volkswagen of America, Inc.*, 803 F.2d 572 (10th Cir. 1986); *Robinson v.*

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[1] The Honorable John L. Kane, Jr., Senior United States District Judge, sitting by designation.

Audi NSU Auto Union Aktiengesellschaft, 739 F.2d 1481 (10th Cir. 1984). In its present incarnation, plaintiffs include claims for negligence, strict products liability, and breach of warranty. See I R. doc. 142 at 1/2 1/297-100 (count I). The district court has ruled that these claims will not be relitigated given the previous adverse final judgment. See I R. doc. 64 at 3; V R. doc. 199 at 3. Also included is a malpractice claim against plaintiffs' previous trial counsel, defendant Greer & Greer (G & G). I R. doc. 142 at 1/2 1/2103-07 (count III). Plaintiffs also claim that defendant VWAG is liable for fraud in connection with H & R's answers to interrogatories and representations at trial. I R. doc. 142 at 1/2 1/2108-09 (count IV). In this same regard, plaintiffs also claim that H & R is independently liable for fraud in its litigation conduct. *Id.* at 1/2 1/2101-02 (count II), 108-09 (count IV). According to plaintiffs, H & R fraudulently concealed the true relationship among VWAG and Audi NSU and Auto Union from the plaintiffs, thereby precluding the plaintiffs from using critical liability evidence against VWAG and collecting damages. G & G has crossclaimed against defendants H & R and VWAG based on the same theories.

H & R claims that it is absolutely immune from civil liability for damages based upon its discovery and courtroom conduct in the previous trial. The district court rejected this theory, stating that "any immunity that might attach to a private attorney's conduct does not attach to the conduct alleged in this case to be fraudulent." V R. doc. 199 at 4. Our review of the district court's legal determination on absolute immunity is de novo. *See Snell*, 920 F.2d at 694. Given the sparing recognition of absolute immunity by both the Supreme Court and this court, one claiming such immunity must demonstrate clear entitlement. *See Burns v. Reed*, 111 S. Ct. 1934, 1944-45 (1991); *Forrester v. White*, 484 U.S. 219, 230 (1988); *Snell*, 920 F.2d at 692-93; *Rex v. Teeples*, 753 F.2d 840, 843-44 (10th

Cir.), *cert. denied*, 474 U.S. 967 (1985); *Lerwill v. Joslin*, 712 F.2d 435, 440 (10th Cir. 1983).

In resolving absolute immunity claims, the Supreme Court has taken a functional approach after considering the history of common law immunity. *See, e.g., Briscoe v. LaHue*, 460 U.S. 325, 334-35, 345 (1983) (absolute immunity for witnesses). Relevant factors include the recognition of immunity at common law, the risk of vexatious litigation given the function involved, and the availability of checks other than civil litigation if absolute immunity was recognized.[2] *Burns*, 111 S. Ct. at 1941-44; *Mitchell v. Forsyth*, 472 U.S. 511, 521-22 (1985). In this case, however, the absolute immunity precedent indicates that H & R's claim of absolute immunity would not be recognized at common law; we need proceed no further. *See Tower v. Glover*, 467 U.S. 914, 922-23 (1984); *Burns*, 111 S. Ct. at 1945 (Scalia, J., concurring in judgment in part and dissenting in part) (common law tradition of immunity is a necessary, but not sufficient, condition for absolute immunity in 1983 actions).

Concerning suits by litigants other than an attorney's own client, the general rule is that:

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[2] Employing this approach, the Supreme Court has held that a judge is absolutely immune from civil damages, unless he or she acts without a colorable claim of jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967). Acting in an administrative capacity, however, a judge does not enjoy the protection of absolute immunity. *Forrester*, 484 U.S. at 230. Likewise, a prosecutor is absolutely immune from civil liability for activities which are "intimately associated with the judicial process" such as initiating and pursuing a criminal prosecution, but is not absolutely immune for activities which are administrative or investigative. *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.16 (1982). Thus, a prosecutor has absolute immunity for controlling the presentation of evidence at trial and participating in a probable cause hearing, but not for providing legal advice to the police. *Burns*, 111 S. Ct. at 1944-45; *Imbler*, 424 U.S. at 430 n.32.

> [i]f an attorney is actuated by malicious motives or shares the illegal motives of his client, he may be personally liable with the client for damage suffered by a third person as a result of the attorney's actions.

7 Am. Jur.2d *Attorneys at Law* § 235 at 275 (1980 & 1991 Supp.). *Accord Anderson v. Canaday*, 131 P. 697, 699-700 (Okla. 1913).[3] Our research suggests that only in a narrow class of cases involving defamation claims has the Supreme Court acknowledged a common law tradition of absolute immunity for private lawyers. The Supreme Court recently discussed the concept in further defining the scope of absolute immunity for prosecutors.

> Like witnesses, prosecutors and other lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings (at least so long as the statements were related to the proceeding), and also for eliciting false and defamatory testimony from witnesses. *See, e.g., Yaselli v. Goff*, 12 F.2d 396, 401-402 (CA2 1926), *summarily aff'd*, 275 U.S. 503, 48 S. Ct. 155, 72 L. Ed. 395 (1927); *Youmans v. Smith*, 153 N.Y. 214, 219-220, 47 N.E. 265 (1897); *Griffith v. Slinkard*, 46 Ind. 117, 122, 44 N.E. 1001, 1002 (1896); *Marsh v. Ellsworth*, 50 N.Y. 309, 312-313 (1872); *Jennings v. Paine*, 4 Wis. 358 (1855); *Hoar v. Wood*, 44 Mass. 193, 197-198 (1841). See also *King v. Skinner*, Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772), where Lord Mansfield observed that "neither party, witness,

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[3] In Oklahoma,

> [a]n attorney is not ordinarily liable for the acts of his client. The fact that through ignorance he gives his client bad advice, on which he acts to the hurt of another, will not make the attorney liable to that other. But where the attorney is actuated by malicious motives or shares the illegal objectives of his client he becomes responsible. *Anderson*, 131 P. at 699-700.

> counsel, Jury, or Judge can be put to answer, civilly or criminally, for words spoken in office."

Burns, 111 S. Ct. at 1941. *See also Briscoe*, 460 U.S. at 335 (*citing King v. Skinner*); *Butz v. Economou*, 438 U.S. 478, 512 (1978); *Imbler*, 424 U.S. at 421-24 (discussing *Yaselli* and *Griffith*).

We have reviewed the cases cited by the Supreme Court and must conclude that while absolute immunity might be afforded government lawyers on these claims, such immunity is not available for a private law firm. The cases relied upon by the Supreme Court support absolute immunity (1) for prosecutors on malicious prosecution and defamation claims and (2) for private lawyers on defamation claims.[1]

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[1] *Yaselli v. Goff* held that a prosecutor was entitled to absolute immunity on a malicious prosecution claim by an acquitted defendant. 12 F.2d at 397-398, 402-03. *See Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, C.J.) (following *Yaselli* on a false arrest claim against prosecutors and concluding that "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who do try to do their duty to the constant dread of retaliation"), *cert. denied*, 339 U.S. 949 (1950). *Youmans v. Smith* was a libel action in which the court recognized a common law privilege associated with a list of pertinent questions prepared by a private lawyer for use in a disbarment proceeding. 153 N.Y. at 215-16, 222. *Griffith v. Slinkard* held that no action will lie against a prosecutor on claims of malicious prosecution and libel by a defendant indicted by a grand jury. 44 N.E. at 1001-02. *Marsh v. Ellsworth* was a libel action against a lawyer who filed an objection to discharge in a bankruptcy action; held, the writing containing the objection is privileged. 50 N.Y. at 309, 313. *Marsh* contains a cogent statement of the rule.

> The law is well settled that a counsel for a party conducting judicial proceedings is privileged in respect to words or writings used in the course of such proceedings reflecting injuriously upon others, when such words and writings are material and pertinent to the questions involved; and that, within such limit, the protection is complete, irrespective of the motive with which they are used; but that such privilege does not extend to matter, hav-

All lawyers are protected by an absolute privilege against defamation actions based upon litigation conduct in judicial proceedings. See 2 F. Harper, F. James & O. Gray, *The Law of Torts* § 5.22 at 191 (1986); 3 *Restatement (Second) of Torts* § 586 at 247-48 (1977); Okla. Stat. Ann. tit. 12, 1443.1 (1980 & 1991 Cum. Supp.); *Kirschstein v. Hayes*, 788 P.2d 941, 947-48, 954 (Okla. 1990)(privilege extends to claims for defamation and intentional infliction of emotional distress). The same rule does not apply to claims for malicious prosecution.

> While prosecuting attorneys are subject to an absolute privilege, *Yaselli*, 12 F.2d at 402-03, attorneys employed by private persons usually appear to come under the general principle and they are liable under the same conditions that would subject a layman to liability for encouraging, without probable cause and for an improper purpose, a third person to instigate criminal proceedings against another.

1 F. Harper, F. James & O. Gray, *The Law of Torts*, § 4.3 at 414 (1986); *Restatement (Second) of the Law of Torts* § 653, comment f & illus. 6. Likewise, in prosecuting civil proceedings, if "an attorney acts without probable cause for belief in the possibility that the claim will succeed, and for an improper purpose, . . . he is subject to the same liability as any other person." *Restatement (Second) of the Law of Torts* § 674, comment d; *Reeves v. Agee*, 769 P.2d

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ing no materiality or pertinency to such questions. Id. at 311-12. *Jennings v. Paine* held that a lawyer commenting upon the testimony of a witness while defending his client is not answerable in damages for slander. 4 Wis. at 375. *Hoar v. Wood* was a slander action by a witness in which the court held that words spoken in judicial proceedings by a party or counsel are not actionable if they are pertinent to the subject matter of inquiry. 44 Mass. at 193, 194-95. Finally, *King v. Skinner* involved an indictment against a justice of the peace for allegedly scandalous words spoken to a grand jury; held, the justice of the peace could not be held to answer either civilly or criminally "for words spoken in office." 98 Eng. Rep. at 529-30.

745, 755 (Okla. 1989) ("We know of no rule which gives lawyers absolute immunity for malicious prosecution.") (footnote omitted).

We think that a similar rule applies in this case. While we recognize that prosecutors and government lawyers defending civil actions have been granted absolute immunity on similar claims,[5] the cases do not support an

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[5] Of particular interest in this case is the type of immunity afforded government lawyers in connection with the false or misleading production and presentation of evidence. In *Imbler* the prosecution had absolute immunity on claims that it "had knowingly used false testimony and suppressed material evidence." 424 U.S. at 428-29. The Court strongly rejected the idea that absolute immunity is not available for claims of "willful suppression by a prosecutor of exculpatory information," Imbler, 424 U.S. at 431 n.34, and it is "now [a] well-settled rule that a prosecutor cannot be held personally liable for the knowing suppression of exculpatory information." *Auriemma v. Montgomery*, 860 F.2d 273, 279 (7th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989). Whether the claim involves withholding evidence, failing to correct a misconception or instructing a witness to testify evasively, absolute immunity from civil damages is the rule for prosecutors. *See, e.g., Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978); *Hilliard v. Williams*, 540 F.2d 220, 221 (6th Cir. 1976). Likewise, absolute immunity also extends to allegations that government lawyers misapplied the law in civil and criminal tax matters heard by a tribunal. *Christensen v. Ward*, 916 F.2d 1462, 1474-75 (10th Cir.), *cert. denied*, 111 S. Ct. 559 (1990). In this circuit, absolute immunity has been upheld even given allegations that a prosecutor allegedly lied and filed a false affidavit in the course of a criminal proceedings. *Martinez v. Winner*, 771 F.2d 424, 438-39, *on reh'g*, 778 F.2d 553, 555-56 (10th Cir. 1985), *vacated on other grounds*, 423 U.S. 1066 (1986).

Absolute immunity also has been extended to government lawyers involved in civil proceedings. Analogizing to the functions of a prosecutor, the Court in *Butz*, 438 U.S. at 517 held that "an agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence." In *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986), the Second Circuit determined that an assistant attorney general defending a wrongful death action was entitled to absolute immunity concerning claims that he concealed facts concerning

analogous common law tradition for private lawyers. Two "client versus counsel" cases suggest that the Supreme Court will not extend absolute immunity without such a tradition. In *Ferri v. Ackerman*, 444 U.S. 193 (1979), the Court ruled that an appointed defense counsel in a federal criminal proceeding, like a private lawyer, does not enjoy absolute immunity from a malpractice action by his former client. Id. at 204-05. The Court reasoned that those traditionally afforded immunity are charged with representing the public trust and should not be deterred by civil damage suits. *Id.* at 203-04. In contrast, the appointed defense attorney does not have a duty to the public at large; rather, "[h]is principal responsibility is to serve the undivided interest of his client." Given the rationale of *Ferri v. Ackerman*, the Ninth Circuit overruled its precedent that public defenders are absolutely immune from suit under 1983, and the Supreme Court affirmed. *Glover v. Tower*, 700 F.2d 556, 559 (9th Cir. 1983), *aff'd*, 467 U.S. 914 (1984).

In *Tower*, the Court determined that a public defender did not have absolute immunity against a 1983 claim al-

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federal involvement in the death by way of an experimental drug program. *Id.* at 569-70, 573. The federal attorneys, who did not represent the State and attempted to minimize the exposure of the federal government through concealment, were not entitled to absolute immunity because their activities were too far removed from the judicial process. *Id.* at 573. Similarly, in *Murphy v. Morris*, 849 F.2d 1101 (8th Cir. 1988), an assistant attorney general defending a prisoner civil rights action was entitled to absolute immunity on claims that he introduced improperly obtained impeachment evidence at trial. *Id.* at 1105 ("The introduction of evidence in a judicial proceeding constitutes a normal and regular advocacy function. . . ."). Absolute immunity did not attach to the act of obtaining the evidence from the prison mail system, an investigative activity. *Id.* In *Snell v. Tunnell*, we held that preparing and presenting an emergency custody application before a judge constitutes advocacy, notwithstanding the incomplete or false allegations contained therein. 920 F.2d at 694. But the state attorney in *Snell* was denied absolute immunity because she acted beyond colorable authority. *Id.* at 696.

leging a conspiracy to convict a defendant whom the public defender represented. 467 U.S. at 923. Because a public defender was unknown to the common law, the Supreme Court analogized to retained defense counsel. *Id.* at 921. In denying absolute immunity, the Court stated:

> "It is true that at common law defense counsel would have benefited from immunity for defamatory statements made in the course of judicial proceedings, . . . but this immunity would not have covered a conspiracy by defense counsel and other state officials to secure the defendant's conviction." *Id.* at 922.

Although the case before us is of the "nonclient versus counsel" variety, *Ferri* and *Tower* suggest that the scope of absolute immunity accorded a private lawyer can be no broader than that originating from common law.

Plaintiffs and G & G seek to hold H & R liable based upon allegedly fraudulent statements in the course of discovery and at trial, but we cannot identify a common law precedent for absolute immunity on such claims.[6] The claims asserted are not for defamation and H & R cannot avail itself of the immunity afforded government lawyers responsible for vindicating the public interest. We must conclude that H & R is not entitled to absolute immunity for the discovery and litigation statements contained in the plaintiffs' second amended complaint.

Next we consider whether we should exercise pendent appellate jurisdiction over otherwise nonappealable issues. H & R urges us to consider whether Fed. R. Civ. P. 60(b) provides the exclusive remedial framework for plaintiffs,

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[6] H & R urges reliance upon the suggestion in *Auriemma v. Montgomery*, 860 F.2d 273, that absolute immunity should extend to "advocates within the broad confines of the civil discovery procedures available in both federal and state courts." *Id.* at 278. We note that the actual holding in Auriemma denies absolute immunity to two government defense lawyers based on an extra-judicial investigation. *Id.* Moreover, before policy concerns may be weighed, a common law predicate for absolute immunity must exist. *Tower*, 467 U.S. at 922.

and if so, whether plaintiffs' action is barred under Rule 60(b)(3). See generally 7 J. Moore & J. Lucas, *Moore's Federal Practice* 1 ¶ 260.24[5] (1987 & 1990-91 Cum. Supp.); *In re M/V Peacock*, 809 F.2d 1403 (9th Cir. 1987); *McCarty v. First of Ga. Ins. Co.*, 713 F.2d 609 (10th Cir. 1983); *Villareal v. Brown Express, Inc.*, 529 F.2d 1219 (5th Cir. 1976). H & R also urges us to consider whether Oklahoma would allow plaintiffs' action given the prior and adverse federal court judgment. We recently indicated that three factors inform a decision about pendent appellate jurisdiction:

> (1) whether the otherwise nonappealable issue is sufficiently developed, both factually and legally, for our review, . . .
>
> (2) whether review of the appealable issue involves consideration of factors closely related or relevant to the otherwise nonappealable issue, . . . and
>
> (3) whether judicial economy will be better served by resolving the otherwise nonappealable issue, notwithstanding the federal policy against piecemeal appeals. . . .

Colorado v. Idarado Mining Co., 916 F.2d 1486, 1491 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1584. Our analysis of these factors, if not the layout of H & R's brief-in-chief,[7] convinces us that this is a case of the pendent appellate jurisdiction tail wagging the jurisdictional dog. The three nonappealable issues raised by H & R simply are not integral to the district court's decision to deny absolute immunity. *See Tri-State Generation & Transmission v. Shoshone River Power*, 874 F.2d 1346, 1353 (10th Cir. 1989). Our resolution of the absolute immunity issue without mention of these issues is telling. Moreover, in light of the pending claims and crossclaims, we think that the

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[7] The first 90% of the brief is devoted to otherwise nonappealable issues.

Rule 60(b) issues may become clearer once the operative facts are determined. This will require the district court to carefully assess and characterize the evidence concerning the alleged fraudulent scheme to deprive the plaintiffs of discovery information and damages. Judicial economy will be better served by evaluating these claims on a more complete record, thus avoiding the potential for revisiting the claims in a subsequent appeal. Pendent appellate jurisdiction is a doctrine of discretion, not of right, and in our discretion we decline to consider the nonappealable claims.

The denial of absolute immunity is AFFIRMED. The remainder of the appeal is DISMISSED. All pending motions are DENIED.*

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* This denial extends to H & R's request that we award it costs, expenses and attorney's fees if we decline to sanction plaintiffs' counsel for filing a belated 10th Cir. R. 27.2 motion. See Appellant's Motion for Costs and Expenses under 28 U.S.C. § 1927 and the Inherent Powers of the Court at 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 88-C-367-E and 88-C-1435-E
Consolidated

HARRY ROBINSON, et al.

Plaintiffs,

vs.

VOLKSWAGENWERK AG, et al.

Defendants.

AMENDED
ORDER

The Order of March 21, 1990 is hereby amended to reflect that Myron Shapiro is not a movant in (1) the motion of Defendants for summary judgment; and (2) the motion of Defendants to dismiss Plaintiffs' Second Amended Complaint. The following order shall be substituted for the March 21, 1990 Order.

The following matters are before the Court:

1. The report and recommendation of the Magistrate entered August 22; 1989 recommending that cases 88-367 and 88-1435 be bifurcated, that the liability issue be tried first and damages reserved for future decision and, that case 88-1435 be dismissed. (docket no. 137).

2. Plaintiff's motion in 1imine addressing how damages will be proved (docket no. 113).

3. The motion of Greer & Greer for partial summary judgment (docket no. 149).

4. The motion of Defendants Volkswagenwerk AG, Herzfeld and Rubin for summary judgment (docket no. 156).

5. The motion of Volkswagenwerk AG and Defendants Herzfeld and Rubin to dismiss Plaintiffs' Second Amended Complaint (docket no. 159).

The Court has reviewed the arguments, the evidentiary materials submitted and, the applicable authorities. The Court has determined that oral argument would not materially assist the determination of these issues and that these matters can be resolved on the basis of the record before the Court. The pending matters will be addressed in turn.

1. ***The August 22, 1989 Report and Recommendation of the Magistrate***:

No objections to the Magistrate's report and recommendation have been filed by any party. The Court has concluded that the Magistrate's report and recommendation should be adopted by the Court.

2. ***Plaintiff's Motion in Limine:***

Plaintiffs' motion seeks a ruling determining how damages will be proved. This motion will be held in abeyance pending the determination of liability.

3. ***The Motion of Defendants Greer & Greer for Partial Summary Judgment:***

This motion is denied. The original Complaint adequately pled the *Braden* issue. The Second Amended Complaint particularized this matter but did not change the theory. Greer & Greer admits it had actual notice of the theory at the time of the original complaint. It will not, therefore, be prejudiced by the amendment.

4. *The Motion of Volkswagenwerk AG, Herzfeld and Rubin, for Summary Judgment*:

This motion in denied. The Court finds that disputed issues of material fact exist regarding representations made to Plaintiffs' attorneys in the first lawsuit which led to the dismissal of Volkswagenwerk AG from the first lawsuit. Further, Defendants have not shown that reliance on their alleged misrepresentations was unjustifiable as a matter of law.

5. *The Motion of Volkswagenwerk AG, Herzfeld and Rubin to Dismiss Plaintiffs' Second Amended Complaint*:

This motion is denied. Defendants argue that the Second Amended Complaint presents an attack on the judgment in the prior litigation and that such claims are barred by res judicata, collateral estoppel and the law of the case. Plaintiffs deny that the Second Amended Complaint attempts to set aside the prior judgment or to relitigate the issues of negligence, products liability and breach of warranty which were resolved against them in the prior litigation. Plaintiffs contend that the Second Amended Complaint merely particularizes their allegations and adds references to evidence revealed in discovery which, Plaintiffs contend, supports their allegations.

This Court already has ruled that the previous products liability action will not be relitigated here. This action concerns only the issue of fraud and other intentional torts. All other claims for relief have been dismissed. By their response to this motion, Plaintiffs concede that this action is so limited. Whatever Plaintiffs' Second Amended Complaint adds to this action, it does not change the claims upon which this action will proceed.

With regard to Defendants' argument that attorneys are absolute immune from liability for their statements made in court proceedings, any immunity that might attach to

a private attorney's conduct does not attach to the conduct alleged in this case to be fraudulent.

In summary the Court orders as follows:

1. The report and recommendation of the Magistrate entered August 22, 1989 is adopted by the Court. Case No. 88-1435 is dismissed on the basis of the oral stipulation of counsel on record August 8, 1989. Greer & Greer will proceed with its allegations of fraud and fraudulent concealment as a cross-claim in case no. 88-C-367-E. This action will be bifurcated; the liability issue will be tried first and the issue of damages is reserved for future decision.

2. Plaintiff's motion in limine addressing how damages would be proved is held in abeyance and will be addressed if and when the damages issue is tried;

3. The motion of Greer & Greer for partial summary judgment is denied;

4. The motion of Volkswagenwerk AG, Herzfeld and Rubin for summary judgment is denied;

5. The motion of Volkswagenwerk AG, Herzfeld and Rubin to dismiss Plaintiffs' Second Amended Complaint is denied.

The hearing on these matters scheduled for April 13, 1990 is stricken.

ORDERED this *24th* day of April, 1990.

-/S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

(2)

No. 91-715

In The

Supreme Court of the United States

October Term, 1991

HERZFELD & RUBIN, P.C.,

Petitioner,

v.

HARRY ROBINSON, KAY ROBINSON, EVA MAY McCARTHY, GEORGE SAMUEL ROBINSON, and GREER & GREER,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI ON BEHALF OF HARRY ROBINSON and KAY ROBINSON; EVA MAY McCARTHY; and GEORGE SAMUEL ROBINSON

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QUESTION PRESENTED

1. Does any state or federal doctrine of official immunity require, as a matter of law, that a private attorney for a party in a civil diversity case can with total protection from civil liability implement a broad fraudulent scheme which includes 1) lying by the attorney directly to the judge as well as to opposing counsel; 2) false answers to crucial discovery requests; and, 3) other acts of misconduct outside the courtroom all of which cause direct harm to his client's opponent?

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I.

STATEMENT OF THE CASE

A. The Proceedings Below[1]

This case is jurisdictionally founded upon diversity of citizenship. 28 U.S.C. §1332. No claim of liability under 42 U.S.C. §1983 is asserted and no other federal question is present. Presumptively, therefore, this case is covered by the decision of this Court in *Erie Railroad v. Tompkins* rather the federal common law developed as an adjunct to Section 1983. *Ferri v. Ackerman,* 444 U.S. 193 (1979). The court below determined and applied *de novo* the law of Oklahoma (Pet. for Cert. App. 5a-8a) as well as the body of official immunity law developed by this Court under 42 U.S.C. §1983 as the applicable standard for determining petitioners' claim of absolute immunity. Respondents believe the result reached below is in accord with either federal law or the law of Oklahoma, whichever is deemed to apply. In this Brief in Opposition, therefore, we will address the issue both in terms of federal Section 1983 law and in terms of the Oklahoma law that would be applicable under the *Erie* doctrine.

After substantial discovery was completed the Robinsons filed their Second Amended Complaint and the defendants below, H&R and VWAG, moved to dismiss the Complaint and at the same time moved for summary judgment. In their opposition to the petitioners' motions

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[1] Since this is a certiorari proceeding the Court has no record before it. The Annotated Amended Complaint which summarizes the discovery record was before the Court of Appeals and is contained in the Appendix cited herein as App. 1 *et seq.*

for summary judgement the Robinsons filed an annotated version of the Second Amended Complaint which ties the discovery product to the allegations of the case. The annotated complaint provides the detail that is necessary to understand the unique factual situation in which this case arises. *See,* App. 1 *et seq.* The trial court, after reviewing the voluminous factual record, denied the motion for summary judgment and other motions. It is from this Order that the appeal in the court below arose.

Contemporaneous with the filing of the Second Amended Complaint, and based on substantially identical factual allegations, the Robinsons also filed a Complaint to Set Aside the Judgments in the prior case on the basis of fraud on the court. Judge Ellison denied the defendants' motion that the complaint to set aside the judgments failed to state a claim for fraud on the court, ruling that if the facts alleged are true, they constitute fraud on the court. He consolidated for trial that case with the case presently on petition here.[2] The parties to the companion cases are not parties to the case here and Herzfeld & Rubin, P.C., petitioner here, is not a party to the other cases although it represents the parties in those

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[2] On the same day as the foregoing two complaints were filed, the Robinsons filed an action for common law fraud against VWOA and Audi in the Arizona State Court based on the same fraudulent scheme. That action was removed to the federal court for the District of Arizona, where Judge Bilby denied the defendants' motion to dismiss the complaint. These three actions were filed in order to obtain a full range of remedies from all participants in the fraud which had been revealed by discovery.

cases as well as itself in this case. See, also, Pet. for Cert. pg. 6, note 3.

B. H&R's Statement of the Case Is Fundamentally Misleading.

In its Statement of the Case, H&R seriously mischaracterizes the facts set forth in the Complaint. The Complaint alleges and the facts show that H&R and Volkswagen AG lied about material matters in interrogatories in the Oklahoma court proceedings (*see, App. 24-39, Par. 56-69*), as well as to Judge Ellison in the federal court, by telling outright falsehoods and by omitting to state facts which made their statements materially false and misleading (*see, App. 39-48, Par. 70-82*). Judge Ellison, characterizing the complaint to set aside the judgment for fraud, which in his words is "identical in substance to the allegations" in the Complaint in this case, said:

> "Plaintiffs allege a scheme by VWAG, its subsidiaries and its attorneys, to conceal or obscure the relationship between VWAG and Audi and to thereby prevent any admissions of VWAG from being introduced into evidence against Audi at the previous trial.
>
> "The specific documents sought to be admitted at trial related to National Highway Transportation Safety Administration (NHTSA) Standard 301, which dealt with fuel system integrity. VWAG, acting through VWOA, filed certain submissions with the federal Department of Transportation (DOT) concerning the dangers of rear-end collisions, the dangers of rear placement gas tanks without adequate fire walls and, the type of testing that DOT should

> require to address these issues. Admissibility of the documents against Audi or VWOA depended on the relationship of the author, VWAG, to the named Defendants when the submissions were made to NHTSA. Plaintiffs allege that from 1965 to 1969 VWAG held a controlling interest in Audi, the entity that conceived the Audi 100. Plaintiffs allege that throughout discovery and at trial, the attorneys for Defendants lied about the true relationship between VWAG and, Audi and VWOA to prevent the NHTSA submissions from being admissible against Audi and VWOA." (*Doc. 200 at 2*).

That is the factual predicate upon which this case stands.

II.

ARGUMENT

A. THERE IS NOT CONFLICT AMONG THE CIRCUITS OR OTHER AMBIGUITY IN THE COURTS REGARDING ABSOLUTE IMMUNITY IN THE CONTEXT OF INTENTIONAL TORTS AND FRAUD UPON THE COURT COMMITTED BY PRIVATE COUNSEL IN A DIVERSITY CASE

Herzfeld and Rubin (H&R) suggest that everybody agrees that this case directly presents a question of federal law. Pet. for Cert., pg. 8, note 5. That is not correct. In footnote 18 of our brief in the Court of Appeals we made clear our position that this was not a §1983 case.[3] In its

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[3] We said there: "The line of cases upon which H&R relies has developed in the context of 'constitutional tort' litigation

(Continued on following page)

opinion, the court below was careful to include references to the appropriate Oklahoma law both common and statutory. In fact, it seems self evident that federal law is not applicable to this common law fraud case that arises under Oklahoma law. Much of the fraud alleged here occurred during the time this case was in state court and state law is clearly applicable to that part of the case. Finally, the Court below determined the state law question *de novo* as required pursuant to this Court's decision in *Salve Regina College v. Russell*, 499 U.S. ___, 111 S. Ct. 1217, 113 L.Ed.2d 190 (1991), see Pet. for Cert. App. 5a-8a. The Petition for Certiorari, we note, does not mention the Oklahoma law upon which the Court of Appeals relied.

The underlying litigation in this case was begun in state court in Oklahoma but was eventually removed to federal court following dismissal of the non-diverse defendants pursuant to this Court's decision in *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286 (1980). The specific acts of fraud that occurred in the federal court room could arguably form the foundation for a federal common law applicable to part of this case, but that question has not been addressed below and was not necessary to the decision below. Moreover, the decision of

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(Continued from previous page)

under Title 42 U.S.C. §1983. This is not a 1983 case and plaintiffs do not claim a constitutional tort, thus, H&R's claimed authorities are not controlling. . . . " BRIEF FOR APPELLEES HARRY ROBINSON and KAY ROBINSON; EVA MAY McCARTHY; and GEORGE SAMUEL ROBINSON, No. 90-5082, United States Court of Appeals for the 10th Circuit. Part VB of that brief was directed to state tort law which forms the foundation for the claims here. *See, Ferri v. Ackerman, supra.*

this Court in *Ferri v. Ackerman*, 444 U.S. 193 (1979) relied upon by H&R for the proposition that this is a federal case, in fact holds exactly the opposite:

> The narrow issue presented to this Court is whether federal law in any way pre-empts the freedom of a State to decide the question of immunity in this situation in accord with its own law. . . . Nor are we concerned with the question whether Pennsylvania may conclude as a matter of state law that respondent is absolutely immune. For when state law creates a cause of action, *the State is free to define the defenses to that claim, including the defense of immunity*, unless, of course, the state rule is in conflict with federal law. (*id.*, at pg. 196-197, *emphasis added*).

Nothing in *Westfall v. Erwin*, 484 U.S. 292 (1988) or *Howard v. Lyons*, 360 U.S. 593 (1959) is inconsistent with that holding since both cases involved federal officer defendants. The applicable rule is therefore clear and well established.

B. EVEN IF FEDERAL LAW IS APPLICABLE HERE, THERE IS NO CONFLICT IN THE CIRCUITS REGARDING ABSOLUTE IMMUNITY FOR PRIVATE LAWYERS

Petitioners seek to create a conflict between the Tenth and the First Circuit Courts of Appeal by invoking what it calls the "leading case" of *Blanchette v. Cataldo*, 734 F.2d 869 (1st Cir. 1984). That case was a diversity case and was an application of Massachusetts common law under the *Erie* doctrine. It has been cited several times as an expression of Massachusetts law and its applicability under the

Erie doctrine and to that extent may be thought by some to be a "leading" case. Even so, while it uses broad language when referring to the Massachusetts immunity rule, *id.* at 877, it is clear that the state rule is limited and only grants an attorney immunity for defamatory or libelous comments during litigation. *Sriberg v. Raymond,* 345 N.E.2d 882 (Mass.1976); *Sullivan v. Birmingham,* 416 N.E.2d 528 (Mass.App.1981). *Sullivan* also makes clear that an attorney is not immune for other types of wrongdoing. 416 N.E.2d at 534. This case obviously does not involve Massachusetts law and the *Blanchette* decision is thus inapposite.

Defendants also refer to and quote from *Auriemma v. Montgomery,* 860 F.2d 273 (7th Cir. 1988), to support their claim that absolute immunity embraces any action taken by any attorney within the broad confines of the discovery process. The quote from *Auriemma* is a partial excerpt taken completely out of context from a case involving two government attorneys, and certainly does not stand for the proposition being asserted by defendants. Indeed, it is important to note that the Seventh Circuit in *Auriemma* denied absolute immunity to a government attorney who had acted outside the courtroom. *See also, Burns v. Reed,* ___ U.S. ___, 111 S. Ct. 1934 (1991). The remaining cases invoked by H&R are also cases involving government attorneys claiming official immunity and are inapposite here. *Barrett v. United States,* 798 F.2d 565 (2d Cir. 1986); *Murphy v. Morris,* 849 F.2d 1101 (8th Cir. 1988). There is no conflict in the Circuit Courts of Appeal.

C. THE LAW OF OKLAHOMA RECOGNIZES THE TORT INVOLVED HERE

The law in Oklahoma – where the tortious acts primarily occurred – is clear that a civil action lies for fraud committed in connection with a lawsuit. The court below cited several examples including *Anderson v. Canaday*, 131 P. 697, 699-700 (Okla. 1913). In *Copeland v. Anderson*, 707 P.2d 560 (Okla.Ct.App. 1985), the court held that an independent action for perjury by a defendant in the underlying litigation would lie as a direct action without any consideration of whether or not the judgment would be set aside. The Oklahoma court said:

> "We hold that the law of this state provides a remedy to one who suffers detriment from the tort of perjury committed by a witness during a court proceeding. *The essential elements of the tort are those required in an action for deceit except for one variant – it is the court or jury that is deceived rather than the injured party.* More specifically the tort of perjury occurs when, during the course of a judicial proceeding, a witness makes a *material* misrepresentation knowing the statement is false or he makes it recklessly, i.e. without any knowledge of its truth and with the intention that it be acted on by the jury or other finder of facts who in turn does act on the false testimony which results in detriment to the plaintiff." 707 P.2d at 568-69 (emphasis added).

In *Morgan v. Graham*, 228 F.2d 625 (10th Cir. 1956), the court, applying Oklahoma law, followed this same analysis. There, in a prior action in the Oklahoma State Court, the president of the defendant insurance company filed a verified answer denying the existence of any policy

which would cover a judgment against the company's assured. "Not having the policy and faced with a certain failure to prove the existence of the policy, . . . [plaintiff] took a voluntary non-suit." *Id.* at 626. When the covering policy later was discovered, federal suit was brought alleging that the defendant president knew that there was an outstanding policy and "in addition to filing the false and fraudulent affidavit Morgan [the president] falsely and fraudulently testified when served with a subpoena that no such policy was outstanding." *Id.* at 627.

The defendants in the second action in *Morgan* argued that the case was really an action for perjury, and therefore, that no independent claim could be allowed. According to the court, however, even though the acts asserted in the complaint, if established, would constitute perjury which would not at that time in Oklahoma be an allowable civil tort, a civil action in tort for damages nonetheless could be predicated upon such testimony if all the elements of civil fraud in Oklahoma were present. The fact that there still was an outstanding judgment based on the non-suit did not preclude the independent action for fraud committed in the course of the lawsuit in which the judgment favorable to the defendants was obtained.

We can find no Oklahoma cases that are squarely on point on the immunity question, though *Reeves v. Agee*, 769 P.2d 745, 755 (Okla. 1989) clearly states that there is no immunity given lawyers for malicious prosecution, as the court below noted. The Oklahoma courts have followed the federal immunity doctrine in cases involving governmental officials, see, *McLin v. Trimble*, 795 P.2d

1035 (Okla. 1990), and it is to those cases that we turn our attention.

D. EVEN IF APPLICABLE, THE FEDERAL LAW REGARDING OFFICIAL IMMUNITY PRECLUDES THE CLAIMS MADE HERE

This is not a §1983 case. The cases cited by H&R are §1983 cases. This non-§1983 case does not present an appropriate vehicle for resolving any questions relating to those cases. Indeed, this case appears to be unique. We find no federal law or state law that is directly applicable in support of petitioner's position. Nevertheless, we think it is so that the federal law developed in context of §1983 is analogous. Oklahoma appears to have followed that law in the state court actions under §1983, *McLin v. Trimble, supra,* and we agree that if there is no immunity under the §1983 cases, by a parity of reasoning there is no immunity in this diversity case.

Persons Entitled to Official Immunity

The most recent decisions of this court limit immunity in §1983 actions to cases involving governmental officials. As the Court noted in the most recent opinion:

> This Court has refused to extend absolute immunity beyond a very limited class of officials, including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions, "whose special functions or constitutional status requires complete protection from suit." *Harlow v. Fitzgerald,* 457 U.S. 800, 807

(1982). (*Hafer v. Melo*, ___ U.S. ___ 1991 WL 221067, No. 90-681, November 5, 1991).

H&R claims that they are officers of the court and as such entitled to that official immunity. We do not believe that repeating the talisman "officer of the court" turns a private lawyer into a government official and the refusal of this court to extend absolute immunity in the two non-official lawyer cases it has decided would seem to compel that conclusion. *Tower v. Glover*, 467 U.S. 914 (1984); *Ferri v. Ackerman, supra*. Even so, as the Court in *Tower* makes plain, those who seek absolute immunity must show both a common law antecedent and a functional need for the claimed protection. Neither exists in this case.

The Scope of Common Law Immunity

There is no common law immunity for intentional torts committed by lawyers. In the recent decision of this Court in *Tower, supra*, Justice O'Conner noted that:

> "Immunities in this country have regularly been borrowed from the English precedents, and the public defender has a reasonably close 'cousin' in the English barrister. Like public defenders, barristers are not free to pick and choose their clients. They are thought to have no formal contractual relationship with their clients, and they are incapable of suing their clients for a fee. [Citations] It is therefore noteworthy that English barristers enjoyed in the 19th century, as they still do today, a broad immunity from liability for negligent misconduct. [Citing *Rondel v. Worsley* (1969) 1 A.C. 191, tracing the history]. *Nevertheless, it appears that even barristers have never enjoyed immunity from*

> *liability for intentional misconduct [citation] and it is only intentional misconduct that concerns us here." Tower v. Glover,* 467 U.S. 914 at 921, 104 S. Ct. 2820 at 2825 (1984) (Emphasis added).

Mr. Justice Scalia reached a similar conclusion in his concurring opinion in *Burns v. Reed,* ___ U.S. ___, 111 S. Ct. 1934, 1946-1947 (1991). Even under the rule of *Hoar v. Wood,* 44 Mass. (3 Metc.) 193 (1841), which articulated the common law privilege concerning libel and upon which petitioners seek to base absolution here, limited the defamation privilege to those cases where the words "were spoken bona fide, without actual malice, or intent to defame the witness. . . . " (*Id.* at 198).

The Functional Role of Private Counsel

The function of a private lawyer in a garden variety diversity case does not require absolute immunity from intentional torts and this Court's decision in *Tower v. Glover, supra,* and *Ferri v. Ackerman, supra,* by necessary implication so hold. In both of those cases this Court refused to extend absolute immunity to private counsel. The fact that petitioners are private counsel in a civil proceeding seems clearly to bring them within the scope of those cases thus excluding immunity on functional grounds.

CONCLUSION

There is no conflict in the cases applicable here or other reason for this Court to grant certiorari. The Court below properly determined as a matter of common law

both state and federal, that absolute immunity is not warranted here. This Court has repeatedly said that absolute immunity is not the norm and has cast a heavy burden upon those who pretend to it.[4] Petitioners knowingly and intentionally violated the law and they are not entitled to absolute immunity under any theory. Respondents respectfully ask the petition for certiorari be denied.

Respectfully submitted,

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[4] *Malley v. Briggs*, 475 U.S. 335, 339-341, 106 S. Ct. 1092, (1986).

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HARRY ROBINSON and KAY ROBINSON, husband and wife; EVA MAY McCARTHY and GEORGE SAMUEL ROBINSON Plaintiffs, vs. VOLKSWAGENWERK AG, a foreign corporation; GREER & GREER; and HERZFELD & RUBIN, a foreign professional corporation, Defendants.	NO. 88-C-367-E SECOND AMENDED COMPLAINT (ANNOTATED)

COME NOW the plaintiffs, and for their claim for relief against Volkswagenwerk AG, Greer & Greer, and Herzfeld & Rubin allege as follows:

THE PARTIES AND NATURE OF THE ACTION

1. Kay Robinson is the wife of Harry Robinson and the mother of Eva May McCarthy and George Samuel Robinson, is a citizen of Tucson, Arizona, and is a plaintiff in this case.

2. Harry Robinson is the husband of Kay Robinson and the father of Eva May McCarthy and George Samuel Robinson, is a citizen of Tucson, Arizona, and is a plaintiff in this case.

3. Eva May McCarthy is the daughter of Harry and Kay Robinson, is a citizen of Tucson, Arizona, and is a plaintiff in this case.

4. George Samuel Robinson is the son of Harry and Kay Robinson, is a citizen of Tucson, Arizona, and is a plaintiff in this case.

5. Volkswagenwerk AG ("VWAG" hereafter) is the manufacturer of Volkswagen and Audi automobiles and is the controlling party in the "VW Group," which for purposes of this Second Amended Complaint includes VWAG, Auto Union GmbH ("Auto Union"), Audi NSU Auto Union AG ("Audi NSU") and Volkswagen of America ("VWOA"). VWAG is incorporated under the law of the Federal Republic of Germany, has its principal place of business in the Federal Republic of Germany, and is a defendant in this case. VWAG manufactures Audi and Volkswagen motor vehicles at various locations throughout the world, including the United States. Its products are sold extensively in every state of the United States, including Oklahoma, under the names Audi and Volkswagen.

6. Greer & Greer ("G&G" hereafter) is a law firm created under the laws of Oklahoma, is a citizen of that state, and is a defendant in this case. Jefferson Greer is a partner in that firm.

7. Herzfeld & Rubin ("H&R" hereafter) is a New York professional corporation with its principal place of business in New York City, New York. It is the successor firm to Herzfeld & Rubin, a partnership. At all relevant times, Myron Shapiro was an associate or member of the firm.

8. This is an action for products liability, negligence and breach of warranty against VWAG, for fraud against VWAG and H&R, and for professional negligence (legal malpractice) against G&G, based on facts and events which occurred in connection with litigation in this Court, namely, the case entitled *Robinson, et al., vs. Audi, etc., et al.*, Civil No. 80-C-85-E (sometimes hereafter referred to as the "underlying case").

JURISDICTION

9. This Court has jurisdiction of this case pursuant to 28 U.S.C. section 1332, the parties being of diverse citizenship and the amount in controversy being in excess of $50,000.

FACTS REGARDING THE ACCIDENT

10. In 1977, Plaintiffs Harry and Kay Robinson purchased an Audi 100 LS from Seaway Volkswagen in Messina, New York.

11. On September 21, 1977, Plaintiff Kay Robinson and her children, George Samuel and Eva May, were in their Audi 100 LS, traveling to Tucson, Arizona on the interstate highway outside Tulsa, Oklahoma.

12. The Audi 100 LS in which Kay Robinson and her children were traveling was hit in the rear by another auto traveling at high speed. The collision ruptured the gas tank, which caused the Robinson car to be engulfed in flames.

13. At the time of the accident, Plaintiff Harry Robinson was driving a rented truck in front of the Audi

automobile when he saw a burst of flame in his rearview mirror.

14. Plaintiff Harry Robinson stopped the truck immediately and ran back to find the Audi 100 LS containing his wife and children engulfed in flames, but he was unable to open the doors which had been jammed shut by the collision.

15. As Harry Robinson was attempting to open the doors of the car, a man appeared on the scene who kicked out the front window of the Audi 100 LS and pulled the children and Kay Robinson from the car.

16. The entire car was destroyed and Mrs. Robinson and the children were terribly burned.

17. At the time of the accident the Robinsons were carrying a heavy, metal-leg restaurant table in the trunk of their car, and upon information and belief, allege that the leg of the restaurant table punctured the gas tank during the collision, thereby causing burning fuel to spread throughout the car.

18. In 1968, VWAG had published a statement emphasizing the dangers of unprotected fuel tanks being placed in the trunks of automobiles where objects carried in the trunk could puncture the tank. *(Exhibit 116, Exhibit 45 in the underlying trial)*

19. The fuel tank of the Audi 100 LS was not protected from puncture and was, therefore, exceedingly dangerous. That danger was known to VWAG. *(Exhibit 116; see the Court of Appeals' opinion in Robinson v. Audi, 739 F.2d 1481, particularly at 1486, 1489)*

20. Suit was filed in the Oklahoma State Court on behalf of the Robinson family by, among others, Jefferson Greer and G&G, in October 1977. *Identical paragraph 18 in the Amendment to Complaint was admitted by both defendants.*

21. The suit was based solely upon a strict liability theory and named as defendants Volkswagen of America ("VWOA" hereafter), which was the national distributor of Audi in the United States, Worldwide Volkswagen, which was the tri-state distributor of Audi automobiles in New York, New Jersey and Connecticut, and Seaway Volkswagen, which was the Audi dealer in Messina, New York. *(Exhibit 73)* Service of process on all defendants was attempted under the Oklahoma long-arm statute only.

22. On or about May 23, 1978, VWAG was added as a defendant. *(Exhibit 77)* VWAG did not respond to the complaint directly. *(The situation is admitted by defendants' Admissions to identical language in Paragraph 20 of the Amendment to Complaint.)*

23. Shortly thereafter, Jefferson Greer was told by one of the lawyers for the defendants that VWAG was an improper defendant, and that Greer should file an amended complaint dropping it from the lawsuit and substituting Audi NSU as a defendant. *(J. Greer depo. 5/89 p.58, 59; Exhibit 100, p.2) The most contemporaneous and the only written reference to the conversation is contained in a memorandum filed in the court on November 20, 1981 by defendants in which they said, "The Court will note that early in this case the plaintiffs' counsel had joined Volkswagen Aktiengesellschaft as a party defendant in this action but then dismissed as to it upon learning that it had nothing to do with*

the subject Audi." "Had nothing to do with" is merely stronger than defendants' assertion that the conversation related to the manufacture of the specific 1976 Audi 100 LS purchased by the Robinsons (Defs. Brief 2).

24. In reliance on this representation, Jefferson Greer dropped VWAG from the suit by filing an amended pleading substituting Audi NSU as a defendant. *(J. Greer depo. 5/89, p.85-88)*

25. In the first wave of discovery, Jefferson Greer attempted to determine which companies were involved in the design and manufacture of the Audi 100 LS. *(Details are in Paragraphs 56 through 60 herein.)*

26. The initial plaintiffs' interrogatories were objected to on general grounds *(Paragraph 60 herein)*. Finally, certain of the interrogatories were answered *(Paragraphs 59, 62 through 68 herein)*. In those answers, Audi NSU incompletely answered and gave the false impression that VWAG was in no way involved in the design and manufacture of the Audi 100 LS as more particularly described in Paragraphs 60 through 69 herein.

27. At trial of the case, following its removal to this Court as described more fully in Paragraph 55L herein, the relationship between VWAG and Audi NSU in connection with the design and manufacture of the Audi 100 LS became a critical fact in regard to the admission of one of the plaintiffs' most compelling pieces of evidence. *(Details are in Paragraphs 71 through 74 herein)*

28. At the hearing in regard to the admissibility of that evidence, Myron Shapiro, one of the attorneys for the defendants in the earlier case, made various misleading

and incomplete representations to this Court which he avowed were made as an officer of the court and as United States counsel for the Volkswagen Group, as more particularly described in Paragraphs 75 through 81 herein. These representations led this Court to incorrectly believe that there was no relationship between Audi NSU and VWAG in the design, manufacture, or sale of the Audi 100 LS.

29. As a result of the misleading and false information given by defense counsel to Jefferson Greer shortly after the commencement of the action (as described in Paragraph 23, above), the incomplete and misleading interrogatory answers (as described in Paragraph 26, above), and the misleading and incomplete information presented to this Court at the time of trial (as described in the preceding paragraph), counsel for plaintiffs Robinson, including Jefferson Greer and G&G, as well as this Court, were misled in regard to the true nature of that case and the identity of the most culpable defendant in it.

30. In addition, the error created by Myron Shapiro's said incomplete and misleading representations to this Court permeated the record of the proceedings in that action to such a degree, that the United States Court of Appeals for the Tenth Circuit, in the two times it has heard the case, also was misled.

RELATIONSHIPS BETWEEN MYRON SHAPIRO, H&R, VWAG, VWOA AND AUDI NSU

31. Since before 1955, and continuing uninterrupted to the present, H&R has been and is the "United States counsel" for the Volkswagen Group, including among

others, VWAG, VWOA and Audi NSU. In that connection H&R provided a variety of legal services on behalf of these companies. Members of the firm had been in Germany and were familiar with the organization and business of these companies. H&R performed legal services in connection with the formation of VWOA and performed various legal services for VWOA in preparation of importer contracts and other agreements between the various Volkswagen Group entities. H&R generally supervised the litigation brought by United States residents in connection with Volkswagen and Audi vehicles, coordinated the efforts of the various attorneys locally representing these Volkswagen entities, supervised the general conduct of such litigation and, on occasion, participated in trials and provided information with respect to the design and manufacture of automobiles and the relationship of the said various corporations which were part of the Volkswagen Group, and others. H&R participated in the selection of local counsel and actively participated in the defense of these cases including procedural matters and answers to interrogatories. *(Rubin depo. 20-30; Exhibit 128). In substance, the paragraph is admitted to by VWAG and Audi NSU in defendants' Answer to Paragraph 29 of the Amendment to Complaint.*

32. H&R was the agent for VWAG, VWOA and Audi NSU in connection with the answering of interrogatories directed to those companies in suits brought in various parts of the United States and in this connection had the general authority to answer interrogatories for all said companies. *(Exhibit 128; Admitted as to "attorneys" in answer of defendants to Paragraph 30 of the Amendment to Complaint)*

33. In all the acts alleged herein to have been performed by H&R, H&R was acting within the scope of its authority as attorneys or as agents for VWAG, VWOA and Audi NSU. *(Concerning VWAG and Audi NSU it is substantially admitted by defendants' answer to identical Paragraph 31 of the Amendment to Complaint)*

34. In all the acts alleged herein performed by Myron Shapiro, Myron Shapiro was acting as an agent for H&R and the acts alleged herein were done within the scope of his authority. *(It is substantially admitted by defendant Audi's answer to identical Paragraph 32 in the Amendment to Complaint.)*

RELATIONSHIP BETWEEN VWAG, AUTO UNION AND AUDI NSU

35. At the time of the design, as well as the manufacture and initial sales of the Audi 100 series, including the Audi 100 LS, Auto Union, a corporation organized and existing under the laws of the Federal Republic of Germany, was the near alter ego of VWAG. VWAG owned, controlled and dominated Auto Union in at least the following particulars:

A. From the first of January, 1965, VWAG owned or controlled all of the capital interest of Auto Union, through agreements and proxies, and on and after October 18, 1966, VWAG was the legal owner of all the capital stock interest in Auto Union. *(Dekkers depo. 72-77, 95-97; Exhibit 22 in German)*

B. In December of 1964, Daimler Benz Aktiengesellschaft ("Mercedes" hereafter) owned all of the capital stock of Auto Union. On or about December

16, 1964, Mercedes and VWAG entered into an agreement by which VWAG would obtain 100% of the capital stock of Auto Union. The principal terms of that agreement were that VWAG would provide 80 million Deutsche Marks in new capital for Auto Union and that the issued and then outstanding capital stock of Auto Union owned entirely by Mercedes would be transferred in a series of steps to VWAG in exchange for VWAG transferring to Mercedes interest in certain other companies. In connection therewith, Mercedes granted to VWAG a proxy for voting rights of all capital stock standing in the name of Mercedes which were subject to the agreement to be transferred to VWAG. In the implementation of that agreement, at or about midnight, December 31, 1964, VWAG contributed 80 million Deutsche Marks to the capital of Auto Union and by such contribution obtained ownership of 50% of all of the capital stock interest in Auto Union *(Dekkers depo. 64, 65)*. On or about January 4, 1965, VWAG purchased from Mercedes capital shares of Auto Union in the nominal amount of 452,000 Deutsche Marks, or a purchase price of 1,678,050 Deutsche Marks in cash. On or about December 21, 1965, VWAG obtained from Mercedes slightly less than 25% of the nominal value of the shares of Auto Union in exchange for shares owned by VWAG in other companies which were transferred to Mercedes. The parties valued the transaction at 148,321,950 Deutsche Marks. On or about October 18, 1966, VWAG acquired the remaining interests of Mercedes in the capital stock of Auto Union in exchange for the transfer by VWAG to Mercedes of shares in a separate German corporation. The parties valued the amount of the transaction as 147,150,000 Deutsche Marks. *(Dekkers*

depo. 37-39, 64-91, Exhibits 13, 19, 20; see defendants' Supplement to Supplemental Answers to Plaintiffs' Second Set of Interrogatories, answer 12, App.III Exh. E)

C. After the execution of the agreements for the purchase of the stock and the proxy, VWAG commenced to and did "assimilate" Auto Union into VWAG. *(Dekkers depo. 50, 53, 54, Exhibit 16)*

D. On or about December 17/21, 1965, VWAG and Auto Union entered into an agreement that recited that by virtue of the acquisition by VWAG of the majority of the capital shares and by reason of the proxy voting rights, VWAG was in fact the sole proprietor of Auto Union, and that Auto Union was placed completely under the directions of VWAG, and that VWAG "integrated" Auto Union into VWAG. *(Dekkers depo. 95-97, Exhibit 27 in German, Exhibit 247 is the defendants' English translation).* That agreement provided, among other things, "that toward the outside world Auto Union would be legally independent and conduct its business and operation under its own name, but that in the internal relationships between VWAG and Auto Union, Auto Union would act exclusively for the account of VWAG." This agreement was extinguished on August 21, 1969, the effective date of the merger referred to in Paragraph 36 below. *(Dekkers depo. 91-109; deposition exhibit 247) By stipulation and order of Magistrate Wagner of October 4, 1989, the parties have agreed that for purposes of this trial, the translation of the sentence quoted in this paragraph shall read in English, "Maintaining its legal independence [separate legal identity], the subsidiary company shall conduct its business and operations toward the outside world in its own name, in*

the internal relationship, however, exclusively for the account of the parent company" (Exh. 247, p.1)

E. The agreement referred to in Paragraph 35 D above provided that the yearly profits and losses of Auto Union would go directly to VWAG *(Dekkers depo. 101; Exhibit 247 Par. 1(2); Ulmer depo. 102-104).* VWAG provided all funds necessary for the operation of Auto Union and derived directly all profits and losses of Auto Union *(Dekkers depo. 101, 116-129, 200, Exhibits 19, 28, 29, 30, 31, 32, 33, 34, 35, 36).* In connection therewith, in the year 1968, VWAG wrote off directly the costs of development of the Audi 100 series automobile. *(Dekkers depo. 124-125, Exhibit 34)*

F. Commencing in March of 1965 through and including May of 1969 at Ingolstadt (the sole production facility of Auto Union) more Volkswagen Beetles came off the production line than Audi vehicles. *(Dekkers depo. 129-134; Volkswagenwerk AG Annual Reports for 1965, 1966, 1967, 1968; Audi NSU Annual Report for 1969.)* In 1967 through 1969, Audi vehicles were produced at the plant of Volkswagen of South Africa which was a 63% owned subsidiary of VWAG and in which Auto Union had no interest. *(Dekkers depo. 135-137; Volkswagenwerk AG Annual Report for 1967 at p. 51.)*

G. In its Annual Report for each year from 1965 through 1967, the Board of Management of VWAG referred to the Audi vehicles produced at the Ingolstadt plant as "our cars", or "our vehicles", or "our products", and referred to the plant at Ingolstadt as one of "our plants". *(Dekkers depo. 146-157; Exhibits 37, 38, 39, 40, 41, 42, 43.)*

H. In the spring of 1966, the development of the Audi 100 series was presented to members of the Board of Management of VWAG. The budget necessary for the production of the Audi 100 series, the likely profit and loss, the market acceptance, and the general design and the manufacturing schedule were presented by the chief engineer of Auto Union, one Dr. Ludwig Kraus, under whose direction the Audi 100 series was designed and developed. The Board of Management of VWAG approved the design and production of the Audi 100 LS and provided the funds for the development, production and manufacture of such vehicles. *(Dekkers depo. 58-62; Meissner depo. 57-61)*

I. In 1968, VWAG provided the funds of approximately 58 million Deutsche Marks for the expansion of the Auto Union plant at Ingolstadt primarily for the anticipated production of the Audi 100 series. *(Dekkers depo. 47-49; Exhibit 15)*

36. In early 1969, negotiations were commenced between VWAG and a German corporation named NSU Motorwerken AG ("NSU" hereafter) for the merger of NSU and Auto Union. *(Dekkers depo. 158-66)* On March 10, 1969, an agreement to merge the companies was executed. *(Dekkers depo. 162, Exhibit 44 in German; Ulmer depo. 35, 36)* This agreement was conditioned upon the approval of the shareholders of both Auto Union and NSU. It provided that upon the requisite approval it would be retroactive to January 1, 1969. *(Dekkers depo. 163-165, 181; Ulmer depo. 34-36)* Subsequently, NSU sent proxy statements to its shareholders, received objections to the proposed merger, modifications of the merger agreement were obtained, objections to the proposed

merger were explained by the board of directors and at a shareholders' meeting on April 26, 1969, the merger was approved. *(Dekkers depo. 165-173)* VWAG, as the sole owner of Auto Union, approved the merger on May 29, 1969. *(Buxbaum depo. 34-35, 58; Exh. 53 in German)* The merger became effective on August 21, 1969, by recording in the Public Register of Trade and Corporate Affairs, resulting in the formation of the company referred to herein as Audi NSU (officially, Audi NSU Auto Union Aktiengesellschaft). *(Ulmer depo. 39-41)*

37. By the terms of the agreement referred to in the preceding paragraph, VWAG obtained approximately 59.5% of the shares in Audi NSU. The former shareholders of NSU AG obtained the remaining approximately 40.5% of the stock of Audi NSU. *(Dekkers depo. 164)*

38. The merger between Auto Union and NSU had no effect on the production of the Audi 100 series including the Audi 100 LS. Prior to the merger, the Audi 100 series had been designed and was manufactured at the Auto Union plant in Ingolstadt and after the merger the same vehicles were manufactured at the same plant with the same personnel. NSU had a separate manufacturing facility at Neckarsulm. *(Dekkers depo. 174-175, 177)*

39. VWAG embarked on an endeavor to obtain the additional stock of Audi NSU and at the end of the calendar years shown on the following table, owned the approximate number of shares in Audi NSU set forth therein.

Year	%
1969	59.5
1970	75.2
1971	98.6
1972	98.8
1973	98.8
1974	98.9
1975	99.0
1976	99.0
1977	99.0

(Ulmer depo. 66, Exhibit 54) The percentages are substantially admitted in the defendants' answers to the equivalent paragraph of the Amendment to the Complaint.

40. On April 23, 1971, VWAG and Audi NSU entered into a "Beherrschungs-und Gewinnabfuhrungsvertrag" which we translate as "direct control and transfer of profit contract", the first two sentences of which read, by our translation, as follows: "Audi NSU subordinates the management of its company to Volkswagen AG. Volkswagen AG is therefore entitled to issue directives to the Board of Management of Audi NSU regarding directing the company." *(The defendants' two double translations read,*

> *"Audi NSU subordinates the management of its company to VW. VW is thereby entitled to issue directives to the Board of Management of Audi NSU regarding the management of the company" (Exh. 250), or*

> *"Audi NSU places the management of its company under the control of VW. VW is thereby entitled to issue directives to the Board of Management of Audi NSU regarding the management of the company" (Exh. 248).*

Dekkers depo. 185, Exh. 55 in German; Buxbaum depo. exhibits 248, 250). The agreement also provided for the direct transfer of all profit and loss incurred or realized by Audi NSU directly to VWAG. *(Exhibit 248, Par. 2; Dekkers depo. 180)* It also provided for certain assurances to the former share-holders of NSU concerning royalties on the Wankel rotary engine and various other matters. *(Dekkers depo. 180)* The Agreement was approved by the shareholders of Audi NSU *(Dekkers depo. 181, 182)* and became effective on its entry in the Registry on November 19, 1971. *(Ulmer depo. 104-111)* This agreement has never been modified or extinguished. *(Defendants' Supplemental Answer to Plaintiffs' Interrogatory No. 16)*

41. During the years 1971 through to the present, the relationship between Audi NSU and VWAG has been and continues to be of such a character that VWAG substantially controls and dominates Audi NSU, and Audi NSU has become an integrated part of the Volkswagen Group. *(Ulmer depo. 199-202, 212-220)* In 1985, Audi NSU became known as Audi Aktiengesellschaft.

42. The actual vehicle purchased by the Robinsons and involved in the accident was transshipped by VWAG as a forwarding agent from VWAG's port facilities at Emden in a VWAG ship. *(Ceresney depo. 140, Exhibit 134)* At the time of the shipping of that vehicle, there was general agreement that from and after January 1, 1976, all Audi vehicles imported to the United States would be done on the basis that title would be transferred from Audi NSU to VWAG and VWAG would be the party which shipped the vehicles to the United States under an importer's agreement between VWAG and VWOA. *(Ceresney depo. 140-143)*

DEVELOPMENT AND SALE OF AUDI VEHICLES, INCLUDING THE AUDI 100 SERIES, AND INCLUDING THE AUDI 100 LS WITHIN THAT SERIES

43. In March of 1965, Auto Union introduced the Audi 72 (referred to in the United States as the Audi 70) and later the Audi 90 and the Audi 60. These vehicles were front engine vehicles with gas tanks in the rear and were in production at the time of the introduction of the Audi 100. *(Dekkers depo. 139-146; Meissner depo. 25-26)*

44. Shortly after the introduction of the Audi 72, the design, development and testing of the Audi 100 series, including the Audi 100 LS, was commenced and continued. *(Dekkers depo. 29-37)*

45. In November 1968, the Audi 100 series, including the Audi 100 LS, was presented to the press and the public at Ingolstadt, and the Audi 100 series, including the Audi 100 LS, "came to market". *(Dekkers depo. 18-27, Exhibit 19; Shapiro depo. 7/89 p.113-116; Ulmer depo. 24, 54-58; Meissner depo. 67; Defendants' Answer to Interrogatory No. 8)*

46. In 1968, approximately 90 Audi 100s, including Audi 100 LS, were manufactured and approximately 20 were sold. *(Audi NSU Annual Report for 1969 p. 19, Exh. 226; Exh. 14; Dekkers depo. 44-46; Ulmer depo. 60-62)*

47. During the months of January, February, March, April, May, June, July and August, 1969, Auto Union manufactured and sold more than 35,000 Audi 100s *(Defendants' Answers to Interrogatory No. 6; the cars produced before August 19, 1969 were designated Auto Union cars, not Audi NSU cars – Ulmer depo. 43-49)*, including the Audi 100 LS, which was the top-selling model. During

this period, production at the Ingolstadt plant of Auto Union was at full capacity as the demand for the Audi 100 series exceeded the capacity of Auto Union to produce them. (*Dekkers depo. 46-47; Ulmer depo. 63-64; Meissner depo. 66-68*)

48. There were no substantial variations in the design, manufacture or configuration of the Audi 100 LS from its original development through and including the production of the vehicle purchased by the plaintiffs. *See Paragraph 73, infra.*

49. The production of Audi 100 series, including the Audi 100 LS, which began in November of 1968 continued successfully and continuously through 1976, when a new enlarged version of that series, also denominated Audi 100, and known in the United States as the Audi 4000, was introduced and the manufacture and sale of the Audi 100 series discontinued. (*Ulmer depo. 12, 16; Dekkers depo. 175*)

SUBMISSIONS TO THE DEPARTMENT OF TRANSPORTATION

50. The submissions which were sought to be placed in evidence in the trial before this Court were in relation to NHTSA Standard 301 which dealt with fuel system integrity. (*Exhibits 116-120*) Federal motor vehicle safety standard 301 was issued on January 31, 1967 (*32 F.R. 2048*). On October 11, 1967, the Federal Highway Administration proposed certain amendments to the Safety Standards, including Standard 301, and invited comments. (*32 F.R. 14279; the first four pages of Exhibit 116*).

51. On March 18, 1968, on March 10, 1969, on November 25, 1970, on October 2, 1973, and on April 19, 1974, VWAG acting through VWOA, filed with the Department of Transportation certain submissions which related to the dangers involved in rear-end collisions, the dangers involved in the placement of gas tanks in the rear of vehicles without protection of adequate fire walls, and the type of testing which should be required by the Department of Transportation to address these issues. (*Exhibits 116, 117, 118, 119, 120*)

52. VWOA was and is a wholly owned subsidiary of VWAG. In connection with the submissions by VWAG to the NHTSA, VWOA acted as more than a mere statutory agent. In truth and in fact, the submissions were drafted by personnel employed by VWOA. The drafts were sent to VWAG for comment. The final documents were prepared by VWOA and submitted to NHTSA. (*Defendants' Answers to Interrogatory No. 14; Ceresney depo. 157-158*)

53. At all times material herein, these documents, together with all other submissions made by anyone in connection with NHTSA Standard 301, were in microfiche in the offices of H&R (*Ceresney depo. 101-109*). The index maintained by H&R was such that submissions of VWAG, VWOA, and Audi NSU all were indexed under the name "Volkswagen" and therefore any search at H&R for submissions by any of them relating to Standard 301 would have disclosed submissions made by all of them (*Ceresney depo. 156*).

54. These submissions and the relevant Department of Transportation requests for comments to which they related were denominated Exhibits 45 through 49 in the

trial before this Court in Civil No. C-80-0085E. Their probative value was such that had the documents been admitted, the jury verdict would have been different.

PROCEEDINGS IN STATE AND FEDERAL COURTS IN OKLAHOMA

55. The following proceedings took place in the State and Federal Courts in Oklahoma:

A. On or about October 18, 1977, Plaintiffs, acting by and through their then attorneys, including Jefferson Greer and G&G, filed a petition for damages respecting the accident referred to in Paragraphs 11 and 12 herein. VWOA and certain distributors were named as defendants. (*Exhibit 73*)

B. On or about April 26, 1978, Plaintiffs propounded their Fifth Set of Interrogatories to Defendant VWOA.

C. On May 23, 1978, an Amended Petition was filed in which VWAG was added as a defendant. (*Exhibit 77*)

D. On or about May 23, 1978, Plaintiffs propounded their First Interrogatories to VWAG. (*Exhibit 84*)

E. Between May 23 and June 14, 1978, Jefferson Greer had a conversation with a member of the firm of Rhodes, Hieronymus, Holloway & Wilson in which Greer was informed that VWAG was an improper defendant and that Audi NSU was the appropriate defendant. (*Exhibit 100, p.2*)

F. On June 14, 1978, Amended Petition was filed in which VWAG was dropped as a defendant and Audi NSU added as a defendant. (*Exhibit 86*)

G. On or about June 19, 1978, plaintiffs propounded their First Set of Interrogatories to Defendant Audi NSU. (*Exhibit 91*)

H. On or about July 11, 1978, Audi NSU objected to Plaintiffs' First Set of Interrogatories.

I. On or about August 14, 1978, the District Court for the County of Creek in the State of Oklahoma entered its Order with respect to the objections filed by Audi.

J. On or about May 30, 1978, VWOA responded to Plaintiffs' Fifth Set of Interrogatories.

K. On or about April 23, 1979, Audi NSU responded to Plaintiffs' Second Set of Interrogatories to Audi NSU.

L. On or about February 19, 1980, defendants filed a petition for removal of the case from the State Court in Oklahoma to the United States District Court for the Northern District of Oklahoma and all proceedings thereafter were had either in this Court or in the Court of Appeals for the Tenth Circuit.

M. On November 24, 1981, a judge of this Court, United States District Judge James O. Ellison, ruled that Exhibits 45 through 49 would be admissible. (*Transcript X, p. 7, 8*)

N. On November 24, 1981, Myron Shapiro, counsel for Defendants Audi NSU and VWOA, requested a hearing to make a record with respect to the admissibility of those documents and made the representations set forth

in Paragraphs 75 through 81 herein (*Transcript X, p.15*). At the conclusion of that hearing and after submission of the matter to him, Judge Ellison ruled that the Exhibits 45 through 49 would not be admitted in the trial (*Transcript X, p.37*).

O. On or about December 1, 1981, Jefferson Greer asked this Court to reconsider that evidence ruling, and after hearings on that date, the Court reaffirmed its previous rulings and excluded from evidence Exhibits 45 through 49.

P. On December 21, 1981, a verdict was entered in favor of defendants Audi NSU and VWOA. An appeal to the Court of Appeals followed.

Q. On or about July 19, 1984, the Tenth Circuit Court of Appeals announced and published its first opinion in which it affirmed the verdict as to Audi NSU but reversed and required a new trial with respect to VWOA.

R. On or about February 19, 1985, the Oklahoma Supreme Court decided the case of *Braden v. Hendricks*, 695 P.2d 1343 (Okla. 1985).

S. On May 28, 1985, a motion for summary judgment was granted in favor of VWOA on the basis that the *Braden* case precluded the retrial against VWOA.

T. On November 14, 1986, the granting of the motion for summary judgment was affirmed by the Court of Appeals for the Tenth Circuit.

All paragraphs except A, C, D, E, F, G, N, R were substantially the allegations in paragraphs 56, 57, 61-66, 68-70, 72 and 73 in the Amendment to Complaint and were admitted by defendants.

THE ACTIONS OF DEFENDANTS BY AND THROUGH H&R, THEIR ATTORNEYS AND DULY AUTHORIZED AGENTS

56. In the First set of Interrogatories propounded to Audi NSU, described in Paragraph 55G above, the following interrogatories, among others, were propounded:

"INTERROGATORY NO. 123
In what year was the model cycle of the Audi 100 LS begun? (*Exh. 91, #J0047*)

"INTERROGATORY NO. 124
State in what country the first model cycle of the Audi 100 LS was first sold and state the date of such sale. (*Exh. 91, #J0047*)

"INTERROGATORY NO. 126
Please state the entire *planning history* of the model cycle Audi 100 LS, from the point of conception to the production of Job #1 in this model cycle, including information on all test vehicles, prototypes, or other pre-production models that was utilized in arriving at the Audi 100 LS model made available for sale to the general public, including, but not limited to, the following information:

a. The date planning of the Audi 100 LS was first begun;

b. The name, address and job title of the person most responsible for planning of this model;

c. State when the planning was completed;

d. State where the planning was conducted;

e. State what records were kept of the planning of the Audi 100 LS;

f. The name and address of the custodian of the above-mentioned records." (*Exh. 91, #J0047*)

Interrogatories 127, 128, 129, 130 ask substantially the same information, related however to the entire research history, design history, engineering history, development and testing history respectively. (*Exh. 91, #J0048-J0050*)

"INTERROGATORY NO. 133
List the name and address of the corporate entity which first conceived the Audi 100 LS, and trace the history of the ownership and organization of such entity from the period of conception of the Audi 100 LS, to and including the year 1976. (*Exh. 91, #J0050*)

"INTERROGATORY NO. 148
What is the relationship between Audi NSU Auto Union Aktiengesellschaft and Volkswagen of America, Inc.? (*Exh. 91, #J0053*)

"INTERROGATORY NO. 149
What is the relationship between Audi NSU Auto Union Aktiengesellschaft and Volkswagenwerk Aktiengesellschaft? (*Exh. 91, #J0053*)

"INTERROGATORY NO. 150
Trace the corporate history of defendant (AUDI), including the date of incorporation and all mergers or consolidations with other entities." (*Exh. 91, #J0055*)

"INTERROGATORY NO. 32
List the name and address of the person within your organization who was most responsible for the design of the 1976 Audi fuel tank and the position of the:
a. Fuel tank;
b. Filler spout;

c. Filler cap of the fuel tank.
(*Exh. 91, #J0030*)

"INTERROGATORY NO. 38
State what safety features were designed into the Audi automobile with regard to the placement of the fuel tank and possible rear-end collisions.

In this connection, give the following information:

a. The name, address and job title of the persons who contributed to the design.

b. State the training, experience and qualifications of the persons contributing to this design. (*Exh. 91, #J0031*)

"INTERROGATORY NO. 48
List the name, address and job title of the person within your organization who is most knowledgeable about the overall design of the 1976 Audi automobile. (*Exh. 91, #J0034*)

"INTERROGATORY NO. 79
For each employee who was responsible for the design and development of the 1976 Audi automobile, list the following information:

a. Name and address;

b. Job title and/or profession;

c. Name and address of each professional or industry association to which each such employee belongs.
(*Exh. 91, #J0039*)

"INTERROGATORY NO. 80
List the name and address of those employee[s] who were responsible for the design of the 1976 Audi 100 automobile who are no longer

employed by defendant (AUDI). (*Exh. 91, #J0040*)

"INTERROGATORY NO. 89
List the name and address of the present employer of the project engineer for the 1976 Audi automobile. (*Exh. 91, #J0041*)

57. In the First Set of Interrogatories propounded to the then Defendant VWAG, described in Paragraph 55D above, interrogatories in substantially similar form to those set forth as Interrogatories 123, 124, 126-130, 133, were proposed to VWAG as Interrogatories 125, 126, 128-132, 135. (*Exhibit 84*) Full and fair answers to these interrogatories would have disclosed the essential facts set forth in Paragraphs 35-49 above.

58. In the Fifth Set of Interrogatories propounded to VWOA, described in Paragraph 55B above, interrogatories substantially similar to the Interrogatories 123, 124, 126-130, 133 propounded to Audi NSU were propounded to VWOA. (*Exhibit 75*) Full and fair answers to these interrogatories would have disclosed the essential facts set forth in Paragraphs 35 through 49 above.

59. On or about May 28, 1978, VWOA answered Interrogatories Nos. 1 and 2 propounded to them in the Fifth Set of Interrogatories as follows:

"1. In what year was the model cycle of the Audi 100 LS begun?

"ANSWER: VWoA respectfully objects to use of the terminology 'model cycle' on the grounds that it is vague, ambiguous, without a proper frame of reference and incomprehensible. The 1970 model year was the first model year Audi 100's were imported by VWoA.

"2. State in what country the first model cycle of the Audi 100 LS was first sold and state the date of such sale.

"ANSWER: See objection to interrogatory 1 for use of the term 'model year'. Unknown to this answering defendant."

With respect to the remaining interrogatories, VWOA responded substantially that VWOA does not design, manufacture, assemble or test Audi vehicles and does not possess the information requested. (*Exhibit 82*) These answers to interrogatories were false and misleading in that VWOA did have the information which was responsive to these interrogatories. *Meissner, an employee of VWOA had such information or could have obtained it.*

60. On or about July 11, 1978, Audi NSU made the following objections to plaintiffs' First Set of Interrogatories, which were ruled on by the Oklahoma State Court on August 14, 1978, substantially as follows:

Interrogatory	Objection	Ruling
124	Irrelevant, incompetent, immaterial, burdensome and oppressive	sustained
126 thru 130	Irrelevant, incompetent, immaterial, burdensome and oppressive and unlimited to the issues involved in this case	The court reserved ruling on these interrog-atories pending resubmission by the plaintiff following discovery
133	Incompetent, irrelevant and immaterial	overruled
149, 150	Incompetent, irrelevant, immaterial	overruled
38	Unlimited in time or model; vague and indefinite	overruled
79	Burdensome, oppressive, unlimited as to vehicle components & system in issue, hundreds of people involved & would require defendant to take a poll of each one	overruled; words chief design eng. be substituted for "each employee" limited to the '76 Audi 100 LS fuel tank system

Interrogatory	Objection	Ruling
80	[same as Int. 79]	overruled; "design engineers" substitutes for the word "employees" limited to the 1976 Audi 100 LS
88	Overly broad, vague and indefinite	overruled

Audi NSU did not object to Interrogatories 32, 48, 89, 123 and 148. (*Exhibit 92; Exhibit 93*)

61. In connection with the objections filed by Audi NSU to the interrogatories in which objection was made that the interrogatories were over-broad or not related specifically to the 1976 Audi involved in the accident, the court ruled with respect to three interrogatories, but no more, that the answers would be limited in time from the date of importation of the first Audi 100 into the United States (1970 through and including 1976). (*Exhibit 93*) Notwithstanding the limited nature of this ruling, Myron Shapiro falsely informed counsel for Audi NSU in Germany that all answers to such interrogatories should be limited to that time period unless specifically indicated to the contrary. (*Exhibit 114E; Jones depo. 5/17/89, p.4-14, Exh. 97, Exh. 93*). This misinformation supplied by Myron Shapiro to counsel in Germany was intended to and did result in the concealment and suppression of the true facts alleged in Paragraphs 35 through 49.

62. On or about October 4, 1978, Audi NSU answered Interrogatories 123 and 133 as follows:

> "123. In what year was the model cycle of the Audi 100 LS begun?
>
> "ANSWER: 1969.
>
> "133. List the name and address of the corporate entity which first conceived the Audi 100 LS, and trace the history of the ownership and organization of such entity from the period of conception of the Audi 100 LS, to and including the year 1976.
>
> "ANSWER: The original conception of the Audi 100 LS occurred with the entity known as Auto Union GmbH of Ingolstadt, West Germany. The manufacture of this vehicle occurred after the merger between Auto Union GmbH and NSU Motorenwerke AG, Neckarsulm, West Germany, in 1969. The entity created as a result of this merger was Audi NSU Auto Union AG. There have been no changes in the structure of this entity since the merger in 1969." (*Exhibit 113, p. 26, 28*)

63. The answer to Interrogatory No. 123 is false in that the production and sale of Audi 100 LS commenced in 1968. The answer to Interrogatory No. 133 is false and misleading in that the interrogatory clearly calls for the history of the ownership and organization of the entity which first conceived of the Audi 100 LS from the period of conception to and including the year 1976. While the answer correctly states that the original conception of the Audi 100 LS occurred with the entity known as Auto Union of Ingolstadt, West Germany, the remainder of the answer to the interrogatory sets up an answer to an

interrogatory which was not asked and fails to answer what was asked. More than that, it is false in that the manufacture of the Audi 100 LS did not occur after the merger between Auto Union and NSU. The true facts are that the Audi 100 LS was manufactured by Auto Union in substantial numbers and sold to the public prior to the effective date of the merger (August 21, 1969) between Auto Union and NSU. The statement that there have been no changes in the structure of this entity since the merger in 1969 is false in the sense that the interrogatory calls for the history and ownership of the organization of Auto Union, not its structure, and the history and ownership of the organization would include the matters alleged in Paragraphs 35 and 36. The answer is designed to suppress, and did suppress, the facts set forth in Paragraphs 35 through 49 above.

64. On or about October 4, 1978, Audi NSU answered Interrogatories 147, 148, 149 and 150 as follows:

> "147. List the true and correct name, address and state or country of incorporation of any parent corporations of Audi NSU Auto Union Aktiengesellschaft.
>
> "ANSWER: Volkswagenwerk Aktiengesellschaft, Wolfsburg, West Germany, owns the majority of outstanding shares of defendant's stock.
>
> "148. What is the relationship between Audi NSU Auto Union Aktiengesellschaft and Volkswagen of America, Inc.?
>
> "ANSWER: With respect to the subject 1976 Audi 100 LS, Audi NSU Auto Union AG and

Volkswagen of America, Inc. were parties to an Importer Agreement.

"149. What is the relationship between Audi NSU Auto Union Aktiengesellschaft and Volkswagenwerk Aktiengesellschaft?

"ANSWER: See answer to interrogatory 147.

"150. Trace the corporate history of defendant (AUDI) including the date of incorporation and all mergers or consolidations with other entities.

"ANSWER: See answer to interrogatory 133. (*Exhibit 113, p. 29, 30*)

65. These answers were false and misleading in the following respects. Although it is true that VWAG owned the majority (99%) of the outstanding shares of Audi NSU, this is far wide of the mark of showing the relationship between Audi NSU and VWAG and omits the relevant facts set forth in Paragraphs 36 through 42 above. H&R knew that VWAG owned 99% of the stock of Audi NSU. More particularly with respect to the answer to Interrogatory 148, the defendants and H&R well knew that the question regarding "relationship" included material and significant contracts between the parties, and in fact, with respect to Interrogatory 148, answered the interrogatory solely on the basis of such a contract. The answer to Interrogatory 149 omits the significant contractual relationships set forth in Paragraphs 35 D and 36 above. The answer to Interrogatory 150 is misleading and incorrect on the same basis that the answer to Interrogatory 133 is false and incorrect as set forth in Paragraph 63 above.

66. On or about October 22, 1978, Audi NSU answered Interrogatories 32, 38, 48, 79, 80 and 89 as follows:

"INTERROGATORY NO. 32
List the name and address of the person within your organization who was most responsible for the design of the 1976 Audi fuel tank and the position of the:

a. Fuel tank;
b. Filler spout;
c. Filler cap of the fuel tank.

"ANSWER: It is virtually impossible to identify any one individual who was the 'most responsible' for the design of the fuel tank for the 1976 Audi 100 and the position of the fuel tank, filler spout and filler cap. The aforementioned design and placement represented the work product of numerous individuals such as draftsmen, technicians and engineers. An individual who is knowledgeable with respect to the design and location of the various components of the fuel system is H. Weinert, an engineer, c/o Audi NSU Auto Union AG, Ingolstadt, West Germany." (*Exh. 113, p. 8, 9*)

"INTERROGATORY NO. 38
State what safety features were designed into the Audi automobile with regard to the placement of the fuel tank and possible rear-end collisions.

In this connection, give the following information:

a. The name, address and job title of the persons who contributed to the design.

b. State the training, experience and qualifications of the persons contributing to this design.

"ANSWER: Defendant respectfully objects to use of the terms 'safety features' in that there is a failure to define the terms or to provide a meaningful frame of reference. 'Safety' is a relativly fluid concept. What may be considered safe under one set of circumstances may not be considered safe under another set of circumstances. Furthermore, the 'safety' of components or of a particular design cannot be evaluated in a vacuum but must take into consideration the overall design of the product. The design of the fuel tank and its location complies with the performance requirements established by the Federal Motor Vehicle Safety Standards and industry guidelines existent at the time of manufacture. Certain design criteria which may be considered 'safety features' was the placement of the fuel tank and filler neck (fuel spout) at a substantial distance from the rear bumper. Also, the fact that the Audi 100 does not have a rear differential located near the fuel tank is an additional factor in the overall design criteria for the fuel system as a whole.

With respect to sub-parts a and b, see answer to interrogatory 32." (*Exh. 113, p. 10*)

"INTERROGATORY NO. 48
List the name, address and job title of the person within your organization who is most knowledgeable about the overall design of the 1976 Audi automobile.

"ANSWER: An individual employed by defendant with particular knowledge concerning the fuel system for 1976 Audi 100 LS is H. Weinert,

an engineer, c/o Audi Auto Union AG, Ingolstadt, West Germany." (*Exh. 113, p. 13*)

"INTERROGATORY NO. 79
For each employee who was responsible for the design and development of the 1976 Audi automobile, list the following information:

a. Name and address;
b. Job title and/or profession;
c. Name and address of each professional or industry association to which each such employee belongs.

"ANSWER:
a. Many individuals participated in and were responsible for the design and development of 1976 Audi vehicles. A person knowledgeable in the design and development of 1976 Audi vehicles is H. Weinert, c/o Audi NSU Auto Union AG, Ingolstadt, West Germany;
b. Engineer;
c. Defendant is attempting to obtain such information and will supply same when known." (*Exh. 113, p.18*)

"INTERROGATORY NO. 80
List the name and address of those employee[s] who were responsible for the design of the 1976 Audi 100 automobile who are no longer employed by defendant (AUDI).

"ANSWER: Many individuals participated in and were responsible for the design and development of the 1976 Audi vehicles. See prior answer." (*Exh. 113, p.18*)

"INTERROGATORY NO. 89
List the name and address of the present employer of the project engineer for the 1976 Audi automobile.

"ANSWER: No employee of Audi NSU Auto Union AG was designated Project Engineer. See answer to interrogatory 88." (*Exh. 113, p.20*)

67. The foregoing answers were false and misleading in that Audi NSU informed H&R that an appropriate answer to these interrogatories was the name of Dr. Ludwig Kraus. (*Exhibit 114F*) Despite the fact that Dr. Ludwig Kraus was identified by Audi NSU to H&R as the appropriate person to be disclosed in the answers to interrogatories 32, 38, 48, 79, 80 and 89 (*Exhibit 114F*), and knowing that the relevant issues with respect to the design of the vehicle were primarily fuel tank systems and fuel tank designs (*Shapiro depo. 4/89 p.521; 7/89 p.40-42*) and that no substantial change had been made in such design from the initial conception of the Audi 100 series, including the Audi 100 LS, through the pre-production period and including the 1976 model (*Shapiro depo. 4/89 p.291-292, 518*), defendants and H&R, instead of identifying Dr. Kraus, included the name of one H. Weinert (*Exhibit 113*). Mr. Weinert was an engineer for Audi NSU "to inspect vehicles involved in claims of alleged defective performance and to co-ordinate and gather technical information relevant to the analysis of these claims." This was known to Audi NSU and communicated to H&R. (*Exhibit 114P*) Notwithstanding his actual job, Mr. Weinert's current job was identified in answers to interrogatories as "various automotive engineering aspects of vehicle design and performance." (*Exhibit 136 p.7*) Dr. Kraus had been the father of the Audi 100 (*Dekkers depo. 14; Ulmer depo. 48*), was the chief design engineer who developed the vehicle, was a member of the Board of Management of Auto Union from 1965 to

April 1973 *(Dekkers depo. 12, 13)*, was the Managing Director of the Technical Development Department of Auto Union and Audi NSU *(Dekkers depo. 14; Ulmer depo. 49-50)*, was a signatory to the agreement referred to in Paragraph 35D above *(Exhibit 247)*, was present at the introduction of the Audi 100 LS in November of 1968 as alleged in Paragraph 45 *(Dekkers depo. 19; Exh. 5)*, and knew all the facts alleged in Paragraphs 35 through 49. The suppression of his name was designed to and did suppress the capacity to obtain the information contained in Paragraphs 35 through 49.

68. On or about April 23, 1979, Audi NSU responded to Interrogatory 24 contained in Plaintiffs' Second Set of Interrogatories to Audi NSU as follows:

> "24. State how many Audi 100 LS's were manufactured for each of the years 1969 through 1976.
>
> "ANSWER: Audi manufactured approximately 40,844 Audi 100 LS vehicles in 1969, 66,704 in 1970, 68,903 in 1971, 80,996 in 1972, 89,186 in 1973, 56,114 in 1974, 33,830 in 1975, and 22,503 in 1976."

The term "Audi" in the foregoing answer was defined as referring to Audi NSU: "Now comes Audi NSU Auto Union Aktiengesellschaft ('Audi') and makes the following answers to plaintiff's second set of interrogatories:". *(Exhibit 136 p.1)*

69. The answer was false and misleading in that the question clearly calls for how many Audi 100 LS's were manufactured, not who manufactured them, and further, the answering of a question not asked, to wit, the number

of automobiles manufactured by Audi, enabled the defendants and H&R to continue to affirm the fiction that it was Audi NSU rather than Auto Union which manufactured Audi 100 LS vehicles initially. H&R knew that the information forwarded to them for purposes of answering this interrogatory was limited to the number of automobiles manufactured, and did not include which entity manufactured them. More than that, the answer is false in that, if Audi NSU actually manufactured 40,844 Audi 100 LS vehicles in 1969, the total number of Audi 100 LS vehicles manufactured in 1969 was not 40,844 because Auto Union, prior to the merger, manufactured substantial numbers of Audi 100 LS vehicles. If it is true that 40,844 is the total number of Audi 100 LS vehicles actually manufactured in 1969, the answer is false in that Audi NSU did not manufacture all of them and a substantial number were manufactured by Auto Union.

70. The proceedings described in Paragraphs 71 through 81 herein occurred in this Court before United States District Judge Ellison.

71. The proceeding relating to the admissibility of exhibits 49-54 concerned documents which had been submitted by VWAG through its agent in the United States, VWOA, to the Department of Transportation and the National Highway Traffic & Safety Administration ("NHTSA" hereafter) in connection with proposed regulations with respect to the fuel system integrity of automobiles *(Exhibit 116 p.5; 32 F.R. 14279)*. These documents were characterized by the Court of Appeals as showing that the gas tank eventually used in the 1976 Audi "contained an inherent risk of combustion when impacted from behind", and that this was the "most compelling

evidence of prior knowledge" (739 F.2d at 1486, 1489). The documents were of such probative value that the failure to admit them in the trial of *Robinson v. Audi* led the Court of Appeals to reverse and order a new trial against VWOA, the only party under the record before that court to which knowledge could be attributed (739 F.2d 1487-89).

a. The car, which the Robinsons purchased and which was involved in the accident to which Civil No. 80-C-85-E related, was a 1976 Audi 100LS model serial number 8161018849 *(Petition, Exhibit 73)*. The Audi 100LS was part of the Audi 100 series which, in contradistinction to American models, are not changed substantially each model year, but continued in substantially the same form from its introduction in 1968 through 1977 with minor modifications. *(Dekkers depo. 39, 40)*

72. The factual issues in the *Robinson v. Audi* case, Civil No. 80-0085E involve not the design of the whole vehicle, but rather the placement of the fuel tank and the fuel system integrity. There had been no design changes in the Audi 100, from the initial development of the Audi 100 series through and including the 1976 Audi 100LS, which had any relevance to the issues of the case *(Shapiro depo. 4/89 p.291-292, 518; Jones depo. 4/89 p.98-103)*. In this connection, interrogatories were answered by Audi NSU in the case and verified by Ian Ceresney, a member of the firm of H&R, which provided:

> "131. Please list the following information as to any change or modification made to the (1) design; (2) material; (3) construction; (4) assembly; or (5) location of model cycle Audi 100 LS

during the pre-production period prior to production of Job #1, and during the model cycle up to and including the 1976 production vehicle for:

a. fuel tank;
b. filler pipe;
c. filler cap;
d. fuel lines;
e. evaporated emissions control system;
f. door latch system;
g. body structure;
h. rear bumper system;
i. bumperjack.

"Answer:

a. None.
b. None.
c. None.
d. In 1975 a change was made from a carburetor to a fuel injection system. This necessitated a modification of the fuel lines due to pressure considerations from a synthetic mixture to one of steel.
e. After 1975, a change to a fuel injection system was made to comply with U.S. Emission control Standards.
f. None.
g. A face-lift was conducted in 1974.
h. After 1973, the bumpers were modified to comply with FMVSS 215.
i. None."

(Exhibit 113 p.27, 28; Defendants' Answers to Supplemental Interrogatory to Plaintiffs' Second Set in this case, App.III, Exh. A, p.3)

None of these changes were material in the underlying lawsuit. *(Jones depo. 4/89 p.98, 103; Shapiro depo. 4/89 p.291-292)*

73. The issues, and the relationship between them and the submissions to NHTSA were well known to the defendants and H&R. As Myron Shapiro represented to this Court:

> "I am talking with respect to the issues in this case and the issues that I know about this case and maybe I am wrong about this, is that we are dealing with fuel systems and fuel system integrity and there is a specific safety standard that went into existence January 1, 1968 and that was Safety Standard 301 dealing with fuel system integrity." *(Trans. of Hearing, Nov. 24, 1981, p. 27)*

74. Myron Shapiro made untrue representations of fact to this Court in connection with the hearings on the admissibility of VWAG's submissions to NHTSA on the following subject matters:

A. That VWAG had nothing whatever to do with the Audi 100 series vehicle purchased by the Robinsons;

B. That VWOA acted solely as a statutory agent in connection with the submissions to NHTSA;

C. That Audi NSU, not Auto Union, was the designer and manufacturer of Audi 100 vehicles;

D. That all Volkswagen vehicles were rear engine/front gas tank vehicles and that, therefore, VWAG's submissions to NHTSA were irrelevant. *The details of the untruthfullness and the evidence supporting this is in Appendix II, Exh. A at p. 17 ff., and in Paragraphs 77-80 herein.*

75. Mr. Shapiro stated with respect to the representations made by him to this Court on November 24, 1981, "Everything I have represented to Your Honor has been represented as an officer of the court". *(Transcript XI, p.13)*

76. On or about November 20, 1981, the defendants in the *Robinson v. Audi* case, filed a Motion in Limine and a Memorandum in Support of Motion in Limine in which they stated: VWAG "has nothing whatever to do with the design, manufacture or sale of the subject Audi 100 LS" *(Exhibit 100, p.2)*; and at the hearing on November 24, 1981, Mr. Shapiro stated:

> "If the submissions they want to put in evidence, Your Honor, are by Volkswagen of America acting as the agent for Volkswagen AG in Germany with respect to Volkswagen automobiles, that would be, Your Honor, like putting into evidence here submissions by Ford Motor Company with respect to its products and that has to pass the relevancy test." *(Rptr. Trans. p. 4.) (Transcript X, p.4)*

These statements by Mr. Shapiro were untrue in that they concealed and suppressed the true facts as alleged in Paragraphs 35 through 42 above. They not only concealed the relationship between VWAG and Auto Union and between VWAG and Audi NSU, as well as the connection of VWAG to the design and manufacture of the Audi 100 series, but were intended to and did misrepresent that there was no significant relationship between VWAG and the design and manufacture of the Audi 100 series including the Audi 100 LS. Mr. Shapiro had endeavored to verify from general counsel of VWAG that VWAG had no

connection with the design, manufacture or assembly of Audi vehicles, including the Audi 100 LS, and separately that VWAG did not design, assemble or manufacture the specific vehicle sold to the Robinsons *(Exhibit 114A)*. Rather than confirming these statements, however, counsel for VWAG indicated only that the entity responsible for the design of the Audi 100 was Audi NSU and that the vehicle actually sold to the Robinsons was manufactured by Audi NSU. *(Exhibit 114B)*.

Plaintiffs are informed and believe and on such information believe that Mr. Shapiro's statements were designed to and did omit and conceal the relationship of VWAG to Auto Union and to Audi NSU, as well as VWAG's connection with the development and manufacture of the Audi 100 series.

77. Mr. Shapiro knew that VWOA had knowledge of the contents of the VWAG submissions to NHTSA *(Shapiro depo. 4/89, p.510)*. Nonetheless, he represented to this Court that VWOA was simply acting as a conduit for purposes of transmission of these submissions to NHTSA because VWOA had been designated by VWAG as its agent under the Safety Act, and that the only connection of VWOA with the submissions was that they acted in the capacity of the statutory agent, and that, acting only in that capacity, under the law, knowledge of the contents of the documents could not be attributed to them. *(Shapiro depo. 4/89, p.510-511)*

Mr. Shapiro's representations were false and untrue in that it was in fact VWOA itself which prepared the initial drafts of the submissions, forwarded them to VWAG for comment, revised the drafts and then made

the actual submissions to NHTSA; VWOA was acting as a direct participant in the submissions and not merely as statutory agent. *(Defendants' Answer to Interrogatory No. 14, App.III Exh. C, p.8; Ceresney depo. 157-158)*

78. Later that same day, Mr. Shapiro made the following further representation to this Court:

> "Specifically with respect to Exhibit 45, I would call to His Honor's attention that this document was submitted March 18, 1968. In March 18, 1968, Your Honor, there were no Audi 100 vehicles in existence. They had not been produced for the market. Secondly, Audi NSU Auto Union AG, the defendant who is the manufacturer and designer of Audi vehicles, didn't even exist, Your Honor." *(Rptr. Trans. p. 17.) (Transcript X p.17)*
>
> "MR. SHAPIRO: The date of merger was in 1969. The specific date of which, Your Honor, I cannot give you this moment, but it would certainly require a telephone call and I can give you the exact date. But I can assure the Court that it was in 1969.
>
> "THE COURT: 1969?
>
> "MR. SHAPIRO: Yes, sir. And that was the manufacturer of NSU automobiles, NSU Motorenwerk, MOTORENWERK, and Auto Union AG which was – I am not even certain, Your Honor, that the vehicles were called Audi at that time, but I believe that they were and they retained the name of Audi after the merger at that time.
>
> "THE COURT: Does that have any effect whatsoever on the position that you take?

"MR. SHAPIRO: Well, not with respect to the fact that the successor corporation would have been responsible for acts of either one of the two separate corporations, but that's obviously not an issue in this lawsuit. This vehicle was designed and manufactured by Audi NSU and I only pointed that out that this was a submission that was made before the defendant, the corporate defendant that actually exists today and existed when this vehicle was designed and manufactured did in fact exist, that they were two separate corporations at that time." *(Rptr. Trans. p. 24.) (Transcript X p.24)*

These statements are untrue in that Audi NSU was not the designer of the relevant parts of Audi vehicles; it was not the only manufacturer of Audi vehicles, including the Audi 100 vehicles referred to; and on March 18, 1968, the design and development of the Audi 100 vehicles, including the Audi 100 LS was well under way through Auto Union. The representations implied that it was Audi NSU which was the manufacturer and designer of the relevant parts of Audi 100 LS vehicles and concealed from the Court the relationships between the companies and the design, manufacture and sale of Audi 100 vehicles as set forth in Paragraphs 35 through 49.

These representations are false and misleading in that the implication is that Audi NSU was the entity which designed and manufactured the Audi 100 LS, and falsely portray Auto Union and Audi NSU as being two separate corporations when in truth and in fact they were both owned and controlled by VWAG and, insofar as the design and manufacture of Audi 100 LS vehicles are concerned, they are substantially the same corporation.

79. Again, on that same date, Mr. Shapiro represented to the Court:

> "And I would at this time request Mr. Greer to kindly explain for the benefit of the defendants, if not for the Court, how what Volkswagen of America does as an agent for VW AG, the manufacturer and designer of Volkswagen vehicles, almost all of which or in fact all of which, Your Honor, at this time were vehicles that utilized the fuel tank located in the front of the vehicle." *(Rptr. Trans. p. 18.) (Transcript X p.18)*

The reference to VWAG as the manufacturer of Volkswagen vehicles all of which utilized a fuel tank located in the front of the vehicle with reference to the irrelevance of the submissions to the Department of Transportation is deceptive in that at the time of the submission to the Department of Transportation, even in March of 1968, VWAG had the relationship with Auto Union described in Paragraphs 35 through 37. VWAG so dominated and controlled Auto Union that Beetles were produced at the Ingolstadt plant in higher volume than Audi vehicles, VWAG referred to and treated the Audi vehicles with gas tanks in the rear and engines in the front as "our" vehicles and the plants producing them as "our production facilities", and the design and pre-production activities of the Audi 100 series, including the Audi 100 LS, had been approved by the Board of Management of VWAG and VWAG had expended monies for the development of those vehicles, expanded the plant to provide for the anticipated production needs of such vehicles and was planning to import such vehicles into the United States *(Paragraph 35 of this Second Amended Complaint)* so that the representations of VWAG concerning rear gas tanks and

the safety standards were of substantial economic importance to VWAG and related directly to the Audi 100 LS importation into the United States.

80. At a subsequent hearing before this Court on December 1, 1981, Mr. Shapiro advised Judge Ellison with respect to the representations made by him on November 24, 1981, "everything I have represented to Your Honor has been represented as an officer of the Court". *(Transcript X p.13)*

81. At the time of the answers to the interrogatories, the objections and the representations to the Court referred to above, Defendants knew that the answers and representations were either (a) untrue or (b) in the exercise of reasonable diligence would have known they were untrue or (c) were made with reckless disregard for the truth or (d) were made in the context of volunteering information which omitted to state material facts which omissions made the statements made materially false and misleading.

82. All the facts alleged in Paragraphs 35 through 49 and Paragraphs 72 through 74 were known to VWAG. Mr. Dekkers and Mr. Ulmer were VWAG's 30(b)(6) witnesses. The annual reports are VWAG's reports. VWAG was a signatory to all the relevant contracts.

83. The substance of the facts alleged in Paragraphs 35 A, C, E, F, G, I; 38, 39, 40, 43, and 46 recently have been discovered by Plaintiffs' counsel to be substantially contained in English in the Annual Reports of VWAG or Audi NSU *(The references to the Annual Reports are at each paragraph)*. Plaintiffs are informed and believe and on such information and belief allege that the Annual

Reports were on a continuing basis furnished to VWOA and the facts disclosed in them were therefore known to them *(Rubin depo. 29, 30)*. One Uwe Meissner was an engineer employed by VWOA to investigate accidents involving Volkswagen and Audi vehicles, the preparation and assistance in answers to interrogatories and document production and discovery in claims involving such vehicles. *(Jones depo. 4/89 p.61-62)* He was the designated liaison of Audi NSU in the United States in connection with vehicle accidents involving Audi vehicles *(Meissner depo. 11-13; Shapiro depo. 4/89 p.161-162)*. Mr. Meissner personally knew the substance of the facts alleged in Paragraphs 35 A and H, 42 through 59, 72 and 73 *(Meissner depo. 57-61, 65-68)*.

84. H&R knew directly the facts alleged in Paragraphs 42, 48, 50, 52, and 53, and is charged with the knowledge of Myron Shapiro. The facts alleged in Paragraphs 35 A, C, E, F, G, I; 38, 39, 40, 43, and 46 are substantially disclosed in the Annual Reports in English of VWAG and Audi NSU *(The references to the Annual Reports are at each paragraph)*. H&R on a regular business basis received and reviewed such reports and is charged with knowledge of information contained therein. *(Rubin depo. 29-30)*

85. Myron Shapiro:

A. Knew that at all relevant times Auto Union was substantially totally owned by VWAG; *(Shapiro depo. 4/89 p.428-430; 7/89, p.47)*

B. Knew that the Audi 100 LS was designed and developed by Auto Union in the three to five year period prior to 1969; *(Shapiro depo. 4/89 p.210; 7/89 p.46, 51, 52)*

C. Believed that there were contracts in existence between Auto Union and VWAG and knew that he did not know what those agreements encompassed; *(Shapiro depo. 4/89 p.210, 411, 495-496; 7/89 p.47-51)*

D. Believed that there were contracts in existence between Audi NSU and VWAG and knew that he did not know what those agreements encompassed; *(Shapiro depo. 4/89 p.209, 444-450)*

E. Knew that Audi NSU was substantially totally owned by VWAG; *(Exhibit 80)*

F. Knew that he did not know whether or not Auto Union manufactured the Audi 100 series including the Audi 100 LS prior to the effective date of the merger between Auto Union and NSU in August of 1969; *(Shapiro depo. 4/89 p.229-230, 412; 7/89 p.53, 131)*

G. Knew the contents of answer to Interrogatory 131 referred to in Paragraph 73 above, and knew that there were no relevant changes in fuel tank design or fuel system integrity from the pre-production models of Audi 100 LS, which he knew were designed and produced prior to 1969, through to and including the 1976 model Audi 100 LS purchased by the Robinsons; *(Shapiro depo. 7/89 p.43-46; 4/89 p.291-292, 518)*

H. Knew that the issues in the underlying Robinson case were fuel systems and fuel system integrity; *(Shapiro depo. 7/89 p.40-42; 4/89 p.521)*

I. Knew that he did not know whether or not VWOA had any further connection with the Department of Transportation submissions, other than that of a statutory agent, and knew that he did not know whether his

representation that the only connection of VWOA with those submissions was as a statutory agent was correct. *(Shapiro depo. 4/89 p.511, 512)*

86. The course of conduct alleged here was part of a scheme and plan to suppress the truth from these plaintiffs to their damage.

87. Defendant VWAG, acting through its United States counsel, defendant H&R, intentionally suppressed the truth of its involvement in the design and manufacture of the Audi 100LS in a conscious effort to conceal material facts giving rise to liability, thus barring the assertion of the statute of limitations as an affirmative defense in this case.

88. The plan and scheme of VWAG and H&R to conceal the involvement of VWAG in the design and manufacture of the Audi 100LS was a fraudulent concealment of a material fact for the sole purpose of preventing Plaintiffs from recovering damages arising out of the crash of their Audi 100LS automobile.

89. Plaintiffs did not learn, nor by reason of said fraudulent concealment could they reasonably have discovered until after the employment of the undersigned counsel in October 1986 and investigations subsequent thereto by said counsel, either the true nature of the misrepresentations of VWAG and H&R or the true nature of the relationship between VWAG and Auto Union and between VWAG and Audi NSU as well as the connection of VWAG with the design and manufacture of the Audi 100LS.

90. The acts alleged in the preceding paragraphs were done in an effort to shield the true facts of the connection of VWAG with the manufacture and design of the Audi 100 series, including the Audi 100 LS, and to prevent the admission of Exhibits 45 through 49 which H&R well knew were critical and compelling documents relating to the liability of both VWAG and Audi NSU. Said acts were intended to and did cause the following effects:

A. Prevented the plaintiffs until recently from ascertaining the true facts of the relationship between VWAG and Auto Union and between VWAG and Audi NSU and the connection of VWAG with the manufacture and design of the Audi 100 series, including the Audi 100 LS, and prevented the plaintiffs from obtaining their day in court with respect to VWAG;

B. Precluded the introduction of the evidence of Exhibits 45 through 49 by concealing from the trial judge (United States District Judge Ellison) and from the Court of Appeals for the Tenth Circuit the true relationships as alleged in Paragraphs 35 through 42 herein;

C. Caused Plaintiffs to suffer serious and substantial emotional distress, financial loss, pain and suffering of five distinct types:

(1) Independent of the results in this suit, or any other previous suit, the anxiety and substantial emotional distress caused by the unconscionable delay in enabling these Plaintiffs to obtain an appropriate day in court with appropriate evidence against culpable defendants;

(2) The loss of the lawsuit against Audi NSU which result would have been different if Exhibits 45 through 49 had been admitted;

(3) Even if and when these Plaintiffs recover a judgment against VWAG for their damages sustained in the accident, the loss of interest and heightened anxiety and physical and mental pain and discomfort caused by the suppression of the existence of a claim for relief against VWAG; and

(4) Loss of the opportunity to try the underlying case with the most compelling evidence, and

(5) Loss of the chance of prevailing in the underlying lawsuit with the most compelling evidence.

94. Each of the acts alleged in this Second Amended Complaint was a probable and substantial cause of the ultimate injury suffered by plaintiffs described hereafter.

95. The action of all defendants and their subsidiaries and their agents, as alleged in this Second Amended Complaint, ultimately combined to create an indivisible injury to plaintiffs, viz, the loss of their right to a full and fair opportunity to present their case to a jury of their peers and to recover the full damage to which they would have been entitled upon the jury's verdict, as well as the value of the chance to win the lawsuit with the admission of Exhibits 45-49.

96. The conduct of defendants VWAG and H&R alleged herein was wilfull, oppressive, malicious, and fraudulent and was done with evil and fraudulent motive and intent, justifying imposition of punitive damages.

COUNT ONE

97. Each of the allegations set forth in Paragraphs 1-93 are realleged and incorporated herein as if set forth in full.

98. The Audi 100LS was negligently designed, tested, manufactured, and placed on the market by VWAG and/or one or more of its subsidiaries or controlled companies, including but not limited to Auto Union and Audi NSU, from whose activities VWAG derived economic benefit. As a direct and proximate result of this negligence, Plaintiffs suffered injuries and damages as alleged herein.

99. The Audi 100LS was a defective product as a result of the design of the gas tank. This defect rendered the automobile unreasonably dangerous. This defect existed at the time the automobile left the manufacturer which was VWAG and/or one or more of its subsidiaries or controlled companies, including but not limited to Auto Union and Audi NSU, from whose activities VWAG derived economic benefit. As a direct and proximate result of this defect, Plaintiffs suffered injuries and damages as alleged herein.

100. VWAG and/or one or more of its subsidiaries or controlled companies, including but not limited to Auto Union and Audi NSU, from whose activities VWAG derived economic benefit, breached the warranty of merchantability as to the Audi 100LS. As a direct and proximate result of this breach of warranty, Plaintiffs suffered injuries and damages as alleged herein.

COUNT TWO

101. Each of the allegations set forth in Paragraphs 1-96 are realleged and incorporated herein as if set forth in full.

102. Defendant H&R, directly and through its firm member Myron Shapiro, consciously and intentionally concealed the true facts from this Court and from Plaintiffs, as described in Count One above.

COUNT THREE

103. Each of the allegations set forth in Paragraphs 1-96 are realleged and incorporated herein as if set forth in full.

104. As a result of the failure of G&G to pursue a negligence theory in addition to a strict liability theory of recovery, G&G failed to establish an alternative evidentiary base for the admission of the most compelling evidence in support of Plaintiffs' case. That failure in turn led to the success on the part of VWAG and H&R to isolate and remove VWAG as a defendant in the lawsuit.

105. After the Oklahoma Supreme Court decided the Braden case, as alleged above in Paragraph 55R, had G&G amended the pleadings to rename VWAG – the author of the critical document – as a party defendant, or amended the theory of the case to include negligence, the documents would have been admissible.

106. G&G failed to pursue settlement negotiations initiated by the defendants in the original case, and failed

to inform the clients, Plaintiffs, of their right to accept settlement offers made by those defendants.

107. G&G committed other acts of negligence and malfeasance which resulted in failure to recover anything whatsoever on behalf of Plaintiffs.

COUNT FOUR

108. Each of the allegations set forth in Paragraphs 1-96 are realleged and incorporated herein as if set forth in full.

109. Defendant H&R, directly and as agent and attorney for VWAG, and Defendant VWAG, directly and through its subsidiaries or controlled companies, including VWOA, Auto Union and Audi NSU, and through H&R, committed fraud against Plaintiffs by means of and as a direct and proximate result of their conscious concealment from this Court and from G&G as counsel for Plaintiffs of the true role of VWAG in the design and manufacture of the Audi 100LS, and otherwise through implementation of their intentional plan and scheme, all as described herein.

DAMAGES

110. As a result of the accident, Plaintiffs have incurred medical bills in excess of $250,000 and are entitled to special damages in that amount.

111. As a result of Defendants' actions, Plaintiffs have sustained and continue to sustain pain and suffering, and are entitled to be compensated in an amount which is just and reasonable.

112. As a result of Defendants' conscious concealment of VWAG's role in the design and manufacture of the Audi 100 LS, Plaintiffs lost at the trial of their original lawsuit, were deprived of its settlement value, and have suffered great economic and emotional loss. As a result, Plaintiffs are entitled to their loss, plus an additional sum to compensate them for the pain and suffering associated with the loss of their lawsuit.

113. Plaintiffs are entitled to interest, costs, and attorneys fees as provided by law.

114. Plaintiffs are entitled to punitive damages against Defendants VWAG and H&R.

RELIEF REQUESTED

115. Plaintiffs request compensatory damages, as described above.

116. Plaintiffs request punitive damages against defendants VWAG and H&R.

117. Plaintiffs request interest, costs and attorneys fees in such amount as shall be proven at trial of this case.

118. Plaintiffs request such other and further relief as the court deems proper under the circumstances.

DATED: August 14, 1989

RONALD D. MERCALDO
WINTON D. WOODS
THOMAS ELKE
MAYNARD I. UNGERMAN

By: _____

Thomas Elke
Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial on all allegations contained in this Second Amended Complaint.

DATED: August 14, 1989

RONALD D. MERCALDO
WINTON D. WOODS
THOMAS ELKE
MAYNARD I. UNGERMAN

By: _____
Thomas Elke
Attorneys for Plaintiffs

(3)

No. 91-715

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HERZFELD & RUBIN, P.C.,

Petitioner,

v.

HARRY ROBINSON, KAY ROBINSON, EVA MAY MCCARTHY, GEORGE SAMUEL ROBINSON, and GREER & GREER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

Of Counsel:

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December 1991

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TABLE OF CONTENTS

This reply brief, submitted in response to respondents' opposition to the Petition, addresses only matters relevant to this Court's decision to grant review. The federal nature of the immunity question raised by the Petition is of course our primary focus. However, petitioner does not thereby concede any matters not addressed. In particular, there is no concession that the allegations of "lying," fraud and misconduct which respondents lose no opportunity to repeat have the slightest factual merit.

We would note also that respondents' contentions on the merits (Br. in Opp. at 10-12), based as they are on the errors of the court below, illustrate the detrimental effects that the circuit court's decision threatens to have upon immunity jurisprudence in the federal courts. Respondents' misreading of this Court's leading decisions is thus itself a powerful factor favoring review.

I. Immunity For Trial Counsel In Federal Court Was Raised And Decided Below Exclusively in Federal Terms.

Respondents' suggestion that the issue raised on the present petition was or could have been decided under Oklahoma state law (Br. in Opp. at 1, 8-10) is profoundly mistaken. Petitioner has claimed no Oklahoma immunity, either below or before this Court. Like Petitioner's claims, the opinion below is exclusively and explicitly federal in content.

The opinion below rests entirely on the circuit court's reading and application of a series of cases decided by this Court. Only three terse Oklahoma references are scattered among the approximately twenty federal decisions discussed below on the immunity issue. These

isolated references are obviously no more than convenient examples of principles applicable under the federal doctrines which the decision, albeit erroneously, applies.[1]

II. This Case Presents The Precise Federal Question Reserved For Later Decision By This Court In *Ferri v. Ackerman.*

Respondents alternately contend that state law alone governs immunity in this case, notwithstanding the federally based decision of the circuit court. In support of this contention, respondents invoke *Ferri v. Ackerman,* 444 U.S. 193 (1979). Respondents apparently read *Ferri* as holding that no federal question of immunity is presented with respect to the activities of counsel in a federal trial if the subsequent lawsuit is grounded on state law. In fact, *Ferri* both establishes and exemplifies that immunity for participants in federal trials is a federal question, to be resolved independently of whether a given state may grant or deny immunity.

In *Ferri*, after conviction in federal court, a losing defendant sued his own appointed defense counsel (not as here the adverse attorney). The suit, brought in state court, alleged malpractice under state law. The state supreme court held that counsel's claim to immunity as a participant in a federal proceeding was a federal question, and decided the issue in favor of

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1. In fact, no string citation below begins with an Oklahoma case, and the only Oklahoma quotation longer than a sentence is relegated to a footnote. *See* Pet. at 5a n3, 7a, 8a..

immunity. This Court granted *certiorari*, and addressed and decided the immunity issue on the merits (against immunity), again of course as a federal question. 444 U.S. at 196-97. In so doing, however, the Court carefully pointed out that its resolution of the federal immunity issue in no way preempted or foreclosed the state from immunizing the relevant conduct as a matter of its own substantive law. *Id.* at 197-98.

Respondents seemingly view *Ferri's* rejection of federal preemption of state law as somehow establishing an inverse state preemption of federal law in this area. Br. in Opp. at 5-6. This notion cannot be accepted. Though only speaking directly to federal preemption of state law, *Ferri* clearly regarded neither state nor federal law as preemptive of the other.

Most tellingly, *Ferri* specifically reserved for later decision the precise question posed by the present Petition. That question, necessarily a federal matter, was defined by this Court as

> "the issue of whether defense counsel [in federal court] is immune from other kinds of [state law] tort suits ... brought by someone other than his client."

444 U.S. at 204 n22. Respondents' gloss, under which this Court would lack jurisdiction to consider either the question decided or the question reserved in *Ferri*, would literally stand the case on its head. The issue presented on the present Petition is a federal question.

III. No State Court Conduct Is At Issue On The Present Petition. If Petitioner's Evidentiary Arguments To The Federal District Judge Are Immunized, This Action Is At An End.

By repeated references to certain events before this case was removed to the federal court, respondents endeavor to create the impression that the Petition seeks to apply federal immunity to acts occurring in state proceedings. This is not the case. Petitioner claims immunity in this Court only for its alleged acts and statements in federal court. From the face of the complaint, it is clear that the grant of such immunity will end this case.

Plaintiffs allege as the proximate cause of their claimed injury a series of statements made by counsel in argument at trial, addressed to the federal district judge trying the case. These arguments persuaded the district court to change an initial ruling and exclude several exhibits that the court had initially ruled admissible. Br. in Opp. at App. 22-23, ¶¶ M,N.[2] *See also* App. 39-48,

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2. M. On November 24, 1981, ... United States District Judge James O. Ellison ruled that Exhibits 45 through 49 would be admissible...

N. On November 24, 1981, [H&R trial counsel] requested a hearing to make a record with respect to the admissibility of those documents and made the representation set forth in Paragraphs 75 through 81 herein [Br. in Opp. at App.43-App.48]. At the conclusion of that hearing and after submission of the matter to him, Judge Ellison ruled that the Exhibits ... would not be admitted at the trial.

¶¶70-80. This ruling, plaintiffs contend, crucially altered the outcome of the trial.

Petitioner claims federal immunity only for this federal court conduct. This conduct directly caused the changed district court ruling which plaintiffs allege as the root cause of the adverse jury verdict. It is thus the direct proximate producing cause of the "injury" for which they are suing. If immunity is granted to these federal court acts and statements, the entire action against H&R must fail. The federal immunity ruling sought on the present petition is dispositive of the entire case.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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